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OUTLINES PREPARED BY MEMBERS OF THE COMMISSION ON SELECTED TOPICS OF INTERNATIONAL LAW

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I. INTRODUCTION

At the forty-fourth session (1992) of the International Law Commission, the Planning Group of the Enlarged Bureau of the Commission established a Working Group on the Long-term Programme of Work which was composed of the following members: Mr. Derek Bowett (Chairman), Mr. Awn Al-Khasawneh, Mr. Mohamed Bennouna, Mr. Peter Kabatsi, Mr. Mochtar Kusuma-Atmadja, Mr. Guillaume Pambou-Tchivounda, Mr. Alain Pellet, Mr. Jiuyong Shi, Mr. Alberto Szekely, Mr. Vladlen Vereshchetin and Mr. Chusei Yamada. The Working Group was to consider a limited number of topics to be recommended to the General Assembly for inclusion in the programme of work of the Commission.

Under the procedure proposed by the Planning Group on the Working Group's recommendation, which was subsequently endorsed by the Commission,[1] designated members of the Commission, with Mr. Bowett acting as coordinator, were asked to prepare short outlines or explanatory summaries, on topics included in a pre-selected list. Each outline or explanatory summary was to indicate:

(a) The major issues raised by the topic;

(b) Any applicable treaties, general principles or relevant national legislation or judicial decisions;

(c) Existing doctrine;

(d) The advantages and disadvantages of preparing a report, a study or a draft convention if it was decided to proceed with the topic.

The outlines prepared in accordance with this procedure were considered by the Working Group at the forty-fifth session (1993) of the Commission.

At the same session, the Commission decided, on the Working Group's recommendation, that the outlines would be published in an official document of the Commission, to be subsequently included in the 1993 Yearbook of the Commission. The present document has been prepared further to this request. It reproduces the outlines in the alphabetical order of the names of their respective authors.[2]

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[1] See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10, (A/47/10), para. 369.

[2] For the decisions taken by the Commission on the recommendation of the Working Group, following consideration of the outlines, see ibid., chap. VI, section 3.

II. OUTLINES PREPARED BY MEMBERS OF THE COMMISSION ON SELECTED TOPICS OF INTERNATIONAL LAW

THE LEGAL CONDITIONS OF CAPITAL INVESTMENT AND AGREEMENTS PERTAINING THERETO

OUTLINE BY MR. MOHAMED BENNOUNA

The past decade has seen a worsening of the indebtedness of most third world countries, a decline in North-South investment flows, and a glut of aid and assistance policies whose impact on the real development of populations has been negligible.

Promotion of direct private foreign investment in those countries is justified by the following advantages:

(a) Achievement of long-term financing;

(b) Infusion of a spirit of enterprise, acquisition of know-how and introduction of new technologies;

(c) Absence of any adverse effect on balances of payments that are already heavily in deficit. Income is repatriated only if the operation shows a profit, whereas, in the case of loans, fixed interest must be paid regardless of profitability.

But a prerequisite for attracting private capital is the creation of a climate of confidence in which to offer the investor certain guarantees.

In classical international law, the question is dealt with from the standpoint of status of foreigners and their property, and thus in terms of relations between the place of nationality and territorial sovereignty. However, classical law doctrine, which was strongly favourable to capital exporting countries, gave protection of the "acquired rights" of foreigners precedence over the prerogatives of the territorial State.

The challenging of that doctrine by third world countries during the 1960s was to result in the conclusion of a considerable number of bilateral agreements governing the status of foreign investment.

The development and complexity of international economic relations also produced a need for a new legal regime. As Jean-Pierre Laviec remarks in Protection et promotion des investissements - Étude de droit international économique (Protection and promotion of investments - Study in international economic law):

> "The concept of investment has no equivalent in any specific categories of private law. It retains a generic aspect and a functional dimension. Frequently, an investment operation is performed by means of a series of legal acts which, taken in combination, constitute that investment; if each of those acts was considered in isolation, some of them could not be regarded as such."[3]

That point had already been made by an arbitral tribunal in the Holiday Inn v. Government of Morocco case (the first judgement delivered by the World Bank's International Centre for the Settlement of Investment Disputes in 1975).

The fact remains that what characterizes direct investment is that the foreigner controls the final operation. Thus, the unconditional link of nationality is no longer sufficient to determine the national or foreign nature of an investment; the criterion of control must always be applied.

In addition, the phenomenon of transnational corporations will complicate the interaction of those criteria and determination of the nationality of an investment.

A transnational corporation consists of a series of private enterprises, subject to different territorial sovereignties and bound together by a common strategy laid down by the parent company.

In the absence of any legal codification, or of an exact and generally accepted definition, the criterion of control, like the concept of a transnational corporation, is a de facto determination based on an assessment of the actual economic situation.

The legal status of a foreign investment should be sought both in domestic law (national investment codes), and also in international law, by examining international jurisprudence, international bilateral and multilateral agreements and international customary practice.

1. National legislation

National legislation is designed to govern investment on the national territory; in some countries it is consolidated in codes; in others, it is spread among the various relevant fields of local law (commercial, financial, social, etc.).

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[3] Jean-Pierre Laviec, Protection et promotion des investissements -- Étude de droit international économique (Paris, Presses universitaires de France, 1985), p. 25.

It may be consolidated in a single code applicable to all investments, or take the form of sectoral codes for the various economic sectors concerned.

National legislation spells out the conditions for admissibility of the foreign investment (prior approval, contractual procedure), whether or not it needs to be associated with local capital, the specific advantages accorded (tax advantages, customs advantages, etc.), the legal guarantees and procedures for settlement of disputes. More often than not, the legislation refers to procedures established under international agreements (conciliation and arbitration in the case of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,[4] for example).

In any attempt at codification, it would be useful to list the broad legal principles set forth in the national legislation with regard to protection of foreign investment (such as the principles of non-discrimination and national treatment).

2. International jurisprudence

An analysis of international jurisprudence helps to define where general international law stands on this matter.

In this note, we refer briefly to two recent cases brought before the International Court of Justice: The Barcelona Traction, Light and Power Company, Limited case[5] and the Elettronica Sicula S.p.A. (ELSI) case.[6]

In the Barcelona Traction, Light and Power Company case, the Court stressed that, with regard to unlawful acts directed against a foreign capital company, the general rule of international law was that only the national State of that company could bring a claim (the company in question was of Canadian nationality, the majority of the shareholders were Belgian, and it conducted its operations in Spain). In these circumstances, apart from the stipulations of conventions, the question of the protection of shareholders remains unresolved. The Court did, however, admit two exceptions, which allow the national State of the shareholders to act:

(a) Where the company has ceased to exist;

(b) Where the national State of the company has no authority to act on behalf of the company.

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[4] United Nations, Treaty Series, vol. 575, No. 8359, p. 159.

[5] Judgment of 5 February 1970: I.C.J. Reports 1970, p. 3.

[6] Judgment of 20 July 1989: I.C.J. Reports 1989, p. 15.

Lastly, the Court did not consider the case where the State, whose responsibility is at issue, is at the same time the national State of the company (whereas the shareholders are foreign). The Court was called upon to consider that question in 1989.

In the second case, Elettronica Sicula S.p.A. (ELSI), the national State of the company is Italy. Italy is also the State having committed the unlawful acts cited in the claim, and the shareholders are of United States nationality.

Although the Court[7] dismissed the United States application on the basis of its interpretation of a treaty between the two countries, it seems to allow the possibility of a State applying diplomatic protection to shareholder nationals of that State, at least where the foreign company has the nationality of the respondent State.

The question consequently arises whether the Court failed to take into account the trend in a great number of bilateral agreements towards the protection of the shareholders and due regard for the control criterion.

3. Bilateral agreements

Bilateral agreements for the promotion and protection of investment have appeared relatively recently (in the past 30 years).

As a result of decolonization and the challenging of customary law, the industrialized countries have sought other mechanisms for protecting their nationals abroad.

The agreements show great similarity since they are based on prototypes devised by the capital exporting industrialized countries. It follows that this legal regime essentially involves North-South relations.

As of 1987, 265 bilateral treaties for the promotion and protection of investment have been counted.[8]

Most of these agreements refer to the control criterion: "The investment must belong to or be controlled by a national or company of one of the parties." The protected juristic person is defined as a "company in which either natural persons who are nationals of a State, or that State itself, its agencies or its agents have a substantial interest." These agreements repeat a number of customary rules regarding the treatment of foreigners:

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[7] This dispute was decided by a Chamber of the Court.

[8] See the study by the United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, 1988, (ST/CTC/65).

(a) Non-discrimination;

(b) Fair and equitable treatment;

(c) Most-favoured-nation clause.

They also provide detailed procedures for the settlement of disputes.

4. Multilateral agreements

Two conventions are particularly noteworthy in this connection. One is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which was signed at Washington on 18 March 1965, and came into force on 14 October 1966.[9] Under the Convention, a State in exchange for the national State's waiver of diplomatic protection, enables its nationals to have recourse to conciliation and arbitration with the host State.

This Convention makes it possible to internationalize the relationship between the host State and the investor; it defines investment and authorizes recourse to the control criterion. Although we cannot go into a detailed analysis here of the arbitral jurisprudence it has generated, it does contain elements of judgement found in general international law.

The other is the Convention of 11 October 1985 which established the Multilateral Investment Guarantee Agency (MIGA).[10]

This Convention establishes an agency which ensures the foreign investor, and also contains several substantive norms defining investment and the investor (the control criterion). Insurance is made contingent on minimum legal guarantees provided by the host State.

5. International custom

Custom in this field has traditionally centred around the host country's obligation to respect a minimum standard in its treatment of the foreign investor. In the event of a breach of this obligation, the State is liable. From this minimum standard the principles of non-discrimination and national treatment are derived.

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[9] See footnote 4 above.

[10] Convention Establishing the Multilateral Investment Guarantee Agency; U.N. registration no. 26012, 23 June 1988.

The third world States have contested this custom, alleging that it provides absolute protection for the "acquired rights" of foreign investors and limits the prerogatives of the host State with respect to the management of the natural resources and economic activities in its territory (principle of permanent sovereignty over natural resources).[11]

6. Conclusions

To date, it has not been possible to adopt either a multilateral regime for the protection of investments or a code of conduct for transnational corporations. What we do have are a great number of bilateral and multilateral agreements dealing with some aspects of the legal regime for investments.

Also, there is no ample international jurisprudence from which we can glean the main themes in the evolution of general international law.

Furthermore, the proliferation of market economies and economic liberalism is one more reason to scrutinize all these legal instruments and the jurisprudence in order to identify common principles that reflect universal legal opinion and are therefore eligible for codification.

This codification might well take the form of a general multilateral convention, which would be capable of correcting the existing imbalances of bilateral agreements imposed by one of the parties. Such a convention could make a valuable contribution to the regulation of North-South relations in the vital field of investment.

OWNERSHIP AND PROTECTION OF WRECKS BEYOND THE LIMITS OF NATIONAL MARITIME JURISDICTION

OUTLINE BY MR. DEREK WILLIAM BOWETT

1. Introduction

Advances in the science and technology of underwater exploration have facilitated the discovery and recovery of wrecks and their cargoes.

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[11] See Samuel K. B. Asante, "Droit international et investissements," and Georges Abi-Saab, "La souveraineté permanente sur les ressources naturelles," in Droit international: bilan et perspectives, Mohammed Bedjaoui, ed. (Paris, Editions A. Pedone, 1991).

Competing interests surrounding this topic include:

(a) Sport and leisure (the "amateur");
(b) Economic (valuable cargo);
(c) Governmental (security, national heritage, etc.);
(d) Scientific (marine scientific research).

2. Definition of a "Wreck"

The legal definition for the purpose of the law of salvage concentrates on the notion of a vessel "in peril," and the law of salvage presumes that there is an owner and that the salvor is entitled to a reward from the owner for effective salvage.

But there is considerable uncertainty over whether a "wreck" is subject to salvage, as being "in peril."

Of relevance to this issue are the following United States federal cases: Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,[12] Platoro Limited, Inc., v. The Unidentified Remains of a Vessel[13] and Hener v. United States of America.[14]

In addition, the 1910 Brussels Convention on the Law of Salvage,[15] the 1967 Protocol to the Brussels Convention[16] and the 1989 International Maritime Organization's International Salvage Convention[17] are of relevancy to this issue. (These Conventions do not resolve the question, but leave the matter to national law.)

3. Coastal State jurisdiction

Coastal State jurisdiction can take various forms, including:

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[12] 569 F.2d 330, p. 337 (5th Cir. 1978).

[13] 518 F.Supp. 816 (W.D. Tex. 1981).

[14] 525 F.Supp. 350 (S.D.N.Y. 1981).

[15] Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea (signed at Brussels, 23 September 1910): United Kingdom, Treaty Series, No. 4, Cd. 6677 (1913).

[16] United Kingdom, Treaty Series, No. 22, Cmnd. 7095 (1978).

[17] LEG/CONF.7/27.

(a) Power to remove wrecks in the interests of the safety of navigation;

(b) Jurisdiction to entertain salvage claims;

(c) Jurisdiction to "protect" the wreck and regulate access to the site of the wreck;

(d) Jurisdiction to entertain claims to ownership of the wreck and/or its cargo.

In principle, the points made in (a) and (b) are limited to internal and territoral waters.[18]

But in relation to archeological objects and objects of historical origin found at sea, the 1982 United Nations Convention on the Law of the Sea[19], article 303 (2) provides:

> "In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article."

Thus, there is this additional jurisdiction in the contiguous zone.

The areas of the continental shelf/exclusive economic zone and the high seas beyond the limits of national jurisdiction remain subject to great uncertainty in this regard, and it is clear that the 1982 Convention has not established any comprehensive regime to cover wrecks.

(a) The continental shelf/exclusive economic zone

Despite the efforts of some States, notably Greece, to extend coastal State jurisdiction to cover wrecks of archeological or historic interest within 200 miles, the majority opposed these attempts to extend coastal State jurisdiction to resources other than "natural" resources. But there is some State practice to support such a power (see below), and the more limited duty of protection of archeological and historic objects (article 303 (1)) certainly covers these areas.

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[18] See Margorie M. Whiteman, Digest of International Law (Washington, D.C., United States Department of State, 1965), vol. 4, pp. 4-5.

[19] A/CONF.62/122.

However, Australia and Papua New Guinea, in a maritime boundary agreement of 1978, article 9,[20] have assumed a general jurisdiction over wrecks within their sea-bed jurisdiction. And Australia has legislated to this effect in the Historic Shipwrecks Act 1976.

(b) High seas beyond national jurisdiction

Here, too, there is no general regime, but there is in article 149 of the 1982 Convention a special provision dealing with archeological and historic objects:

> "All objects of an archeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archeological origin."

The failure to establish the Authority, however, means that this provision is largely devoid of content, and no authority exists with clear power to protect wrecks, and regulate their disposal, in areas beyond national jurisdiction, at least in cases where ownership has been abandoned.[21]

4. The issue of ownership or title

Are there agreed criteria for determining whether ownership has been retained or abandoned, so that the property is res derelicta?

What law provides these criteria? (The options are the law of the coastal State, the law of the flag, the law of the nationality of the owners, or the law of the State before whose courts the issue is to be adjudicated.)

Wrecks may lose a flag registration, and therefore nationality, under the law of some States after a certain time has elapsed, and they are "de-registered": but this does not affect ownership.

Does the law of State succession adequately deal with problems of a State-owned vessel, where that State has disappeared (i.e., the vessels of Troy and Carthage)?

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[20] Limits in the Seas (Washington, D.C., United States Department of State), No. 87; U. N. registration no. 24238, 7 July 1986.

[21] See Anastasia Strati, "Deep Seabed Cultural Property and the Common Heritage of Mankind," The International and Comparative Law Quarterly, vol. 40 (Part 4), (1991), p. 859.

Are certain categories of vessels subject to special rules?

(a) Naval vessels, military aircraft, and other State-owned vessels, operated for non-commercial purposes

Current practice suggests that there is a presumption against abandonment of title over such vessels, and that an explicit act of transfer or abandonment is required. The rationale for this view lies in part in the security implications of the vessel or aircraft falling into the possession of unauthorized persons, and in part in the desire to keep the wreck untouched as a "war grave."[22]

(b) Wrecks of archeological or historical interest

The attempt by some States to introduce a special regime for such wrecks in the 1982 Convention failed, but the Convention does contain certain limited provisions:

- article 149 (cited above in section 3 (b));
- article 303, paragraphs 1 and 3:

> "States have the duty to protect objects of an archeological and historical nature found at sea and shall co-operate for this purpose.
>
> "...

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[22] See United States Department of State Memorandum of 1980: Marian Nash Leich, Digest of United States Practice in the International Law (Washington, D.C., United States Department of State, 1980), p. 1005; Michael G. Collins, "The Salvage of Sunken Military Vessels," International Lawyer, vol. 10, No. 4 (1976), p. 681; Alfred P. Rubin, "Sunken Soviet Submarines and Central Intelligence: Laws of Property and the Agency," American Journal of International Law, vol. 69, No. 4 (1975), p. 855; Frederic A. Eustis III, "The Glomar Explorer Incident: Implications for the Law of Salvage," Virginia Journal of International Law, vol. 16, No. 1 (1975), p. 177; 1989 U.K./South Africa Exchange of Notes relating to the salvaging of the wreck of the HMS Birkenhead: United Kingdom Treaty Series, No. 3 (1990); 1986 U.K. Protection of Military Remains Act (cap. 35): Current Law Year Book 1986, "Statutes," para. 130; and the 1989 United States/France Agreement over the Wreck of the Alabama: J. Ashley Roach, "France Concedes United States Has Title to the CSS Alabama," American Journal of International Law, vol. 85, No. 2 (1991), p. 381.

> "Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges."

It is difficult to extract from this a general duty of protection, utilizing the State's legislative, administrative and judicial powers, beyond the contiguous zone. So, beyond this zone, the primary issue is: who protects such wrecks? And there are consequential issues relating to ownership and disposal of the wreck and its cargo. Certain States, such as Greece, have argued for a latent right of ownership vested in the State whose cultural heritage the vessel belongs to.

In connection with this issue, reference is made to a number of articles on the subject.[23]

Furthermore, there are a number of UNESCO Conventions dealing with the Cultural Heritage, i.e., the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict; the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and the 1972 Convention for the Protection of the World Cultural and Natural Heritage. But none of these deal explicitly with wrecks, and the obligations imposed on States will presumably not apply beyond the territorial sea.

The Council of Europe has the 1985 European Convention on Offences relating to Cultural Property (likewise not extending beyond the territorial sea); and, more on point, there is a Draft Convention on the Underwater Cultural Heritage, drawn up after the

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[23] See Anthony Clark Arend, "Archeological and Historical Objects: The International Legal Implications of UNCLOS III," Virginia Journal of International Law, vol. 22, No. 4 (1982), p. 777; Jean-Pierre Beurier, "Pour un droit international de l'archeologie sous-marine," Revue générale de droit international public, vol. 93 (1989), p. 45; Lucius Caflisch, "Submarine Antiquities and the International Law of the Sea," Netherlands Yearbook of International Law, vol. XIII (1982), p. 3; John P. Fry, "The Treasure Below: Jurisdiction over Salving Operations in International Waters," Columbia Law Review, vol. 88, No. 4 (1988), p. 863; Bruce E. Alexander, "Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations," Journal of Maritime Law and Commerce, vol. 20, No. 1 (1989), p. 1; and Lyndell V. Prott and P. J. O'Keefe, Law and the Cultural Heritage (London, Butterworths, 1984).

Prott Report.[24]

But there is little specific legislation. The exceptions include:

(a) Australia: The Historic Shipwrecks Act of 1976;[25]

(b) United States of America: The R.M.S. Titanic Maritime Memorial Act of 1986,[26] and the Abandoned Shipwrecks Act of 1987[27] (which essentially regulates powers between State and Federal authorities in U.S. waters and established a register of wrecks).

Moreover, there are few treaties. The known exceptions include:

(a) An agreement between Australia and The Netherlands which concerns Old Dutch Shipwrecks;[28]

(b) An agreement between between Australia and Papua New Guinea on the Delimitation of Maritime Boundaries, 1978, article 9,[29] which confers jurisdiction over wrecks within the area of sea-bed jurisdiction, and obliges the Parties to consult over historic wrecks, but excludes military vessels of either Party wrecked after the date of the Agreement.

5. Disposal of recovered vessels or objects found therein

Assuming access to the site is lawful, the question arises of whether the "finder" acquires title, so various questions arise:

(a) Which Courts have jurisdiction to adjudicate disputes over title? (If coastal States were given this jurisdiction out to 200 miles, most cases would be covered. Most wrecks are found within this distance offshore, since, traditionally, the trade routes have followed the coasts and wrecks have occurred where weather or error has forced a vessel too close inshore.)

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[24] Lyndell V. Prott and P. J. O'Keefe, Final Report on Legal Protection of the Underwater Cultural Heritage, Appendix II to Council of Europe, The Underwater Cultural Heritage (1978) 45.

[25] Acts of the Parliament of the Commonwealth of Australia, No. 190, p. 1596.

[26] U.S. Code Congressional and Administrative News, vol. 2, p. 2082.

[27] 43 U.S.C.A. sec. 2101.

[28] Australia, Treaty Series, No. 18 (1972), p. 17.

[29] See footnote 20 above.

(b) Should certain States have prior, or preferential, rights to either prohibit sale, or purchase the wreck or contents?

JUS COGENS
OUTLINE BY MR. ANDREAS JACOVIDES

One of the topics proposed for inclusion in the Commission's programme of work is jus cogens, or peremptory norms of international law from which no State may derogate by agreement or otherwise. First incorporated into international law by the Vienna Convention on the Law of Treaties in 1969,[30] it has had a considerable historical background and was preceded by substantial preparatory work in the International Law Commission and the Sixth Committee of the General Assembly (see Annex). Considerable material can also be found in the records of the 1968-69 Vienna Conference on the Law of Treaties relative to Articles 53, 64 and 66.[31]

In the nearly quarter of a century since the Convention was adopted, no authoritative standards have emerged to determine the exact legal content of jus cogens, or the process by which international legal norms may rise to peremptory status. While jus cogens has frequently been referred to in debates at the United Nations, including the Security Council, has been the subject of in-depth studies by scholars, has been raised in the proceedings of learned societies, has been alluded to by the International Court of Justice and is often referred to in debates and documents of the International Law Commission (particularly in relation to the current items of State Responsibility and the Draft Code of Crimes Against the Peace and Security of Mankind), there exists no definitive statement of what peremptory norms are or where they may be found. It is frequently said, and in my view correctly, that the principle of the prohibition against the use of force in international relations contained in Article 2(4) of the United

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[30] United Nations, Treaty Series, vol. 1155, No. 18232, p. 331.

[31] United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March - 24 May 1968, Official Records, (A/CONF. 39/11); United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April - 22 May 1969, Official Records, (A/CONF. 39/11/Add. 1); United Nations Conference on the Law of Treaties: documents of the Conference, First and Second Sessions, Vienna, 26 March - 24 May 1968 & 9 April - 22 May 1969, Official Records, (A/CONF.39/11/Add. 2).

Nations Charter is jus cogens.[32] Undoubtedly, other principles and rules of international law exist for which the same status may be claimed. Evidently, there is a need to define the exact parameters of what comes under the rubric of jus cogens since the situation as it now stands is not conducive to the objectivity, transparency and predictability which should characterize a legal principle, especially one which has been solemnly accepted not only in the landmark 1969 Convention but also, identically, in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.[33]

As it now stands, jus cogens can mean a great deal to some and very little to others. The selection of topics for inclusion in the International Law Commission's long-term programme of work provides the opportunity for a highly qualified, authoritative body of experts (which can be credited with codifying the concept in the first place) to study the subject with a view towards establishing which rules of international law are indeed peremptory. On the basis of the International Law Commission's findings, States would have the opportunity, through their representatives in the Sixth Committee and through written comments, to express their views, thereby carrying forward the process of giving exact meaning to jus cogens and filling in the legal vacuum which surrounds the concept. It is therefore submitted that the topic merits a place in the Commission's long-term programme of work for the purpose of study and the preparation of a report. A proposal to this effect has been submitted to the Sixth Committee in the Forty-sixth and repeated in the Forty-seventh Session of the General Assembly.[34] What follows is an attempt to set out more analytically the issues involved in order to facilitate the consideration of this proposal by Professor Derek Bowett and the other members of the Commission.

The concept of jus cogens raises a number of issues at the core of public international law.[35] These may be organized under two basic headings: the effect of jus cogens on international jurisprudence; and, the nature of jus cogens itself. Existing doctrine on the subject speaks much more clearly to the first of these areas than to the second. The jus cogens regime created by the 1969 Vienna Convention on the Law of Treaties represents the modern validation of an important and well-established precept of traditional international law.[36] It suggests that treaties may be invalidated not only by virtue of the conditions under which they are concluded, but also because they may offend overarching legal principles governing the international system. As a result, jus cogens impinges directly upon the customary freedom of States to enter into agreements as they see fit. Otherwise, validly concluded treaties may fall simply because they govern a particular object impermissibly under higher principles of international law.

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[32] See, e.g., Report of the International Law Commission, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10, (A/47/10), p. 76.

[33] A/CONF.129/15.

[34] A/CN.4/L.469, p. 113. Statement by the representative of Cyprus to the Sixth Committee of the General Assembly on the Report of the International Law Commission on the Work of its 43rd Session, 29 October 1991, (A/C.6/46/SR.23). Statement by the representative of Cyprus to the Sixth Committee of the General Assembly on the Report of the International Law Commission on the Work of its 44th Session, 27 October 1992, (A/C.6/47/SR.21).

According to the Vienna Conventions, peremptory norms necessarily void all subsequent, inconsistent treaties ab initio. In the event that they clash with pre-existing treaties, those treaties terminate and are voided from that moment onwards.[37] The relevant provisions read as follows:

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[35] For comprehensive and lengthy studies of the topic, see Jerzy Sztucki, Jus Cogens and the Vienna Convention on the Law of Treaties (Wien, Springer-Verlag, 1974); Christos L. Rozakis, The Concept of Jus Cogens in the Law of Treaties (Amsterdam, North-Holland Publishing Company, 1976); Antonio Gómez Robledo, "Le ius cogens international: sa genèse, sa nature, ses fonctions," Recueil des cours de l'Académie de droit international de La Haye, vol. 172 (1981-III), p. 9; Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law (Helsinki, Lakimiesliiton Kustannus, 1988); and Stefan Kadelbach, Zwingendes Völkerrecht (Berlin, Duncker and Humblot, 1992).

[36] See attached Annex for a brief summary of the legal and intellectual pedigree of jus cogens. For a more detailed survey of the contemporary development of the concept antecedent to the Vienna Convention, see also Erik Suy, "The Concept of Jus Cogens in Public International Law," in Carnegie Endowment for International Peace, Papers and Proceedings, vol. 2 (1967), pp. 26-49.

[37] The Vienna Conventions do not contemplate an actio popularis whereby third parties might attack the congruence of a given treaty with jus cogens. Rather, only the parties to the treaty in question obtain the right to challenge it on peremptory grounds. Disputes between parties to a particular treaty over the compatibility of that treaty with a rule of jus cogens are to be settled first by negotiation, and failing that, by arbitration or adjudication. See articles 65 and 66 of the 1969 and 1986 Vienna Conventions.

"Article 53

Treaties conflicting with a peremptory norm of general international law (jus cogens)

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

"...

"Article 64

Emergence of a new peremptory norm of general international law (jus cogens)

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[38]

Because peremptory norms are, by definition, non-derogable, they may only be superseded by other, later norms of the same character. The restraints imposed by jus cogens on a State's treaty-making powers are therefore absolute. Furthermore, in identifying peremptory norms as an integral part of general international law, article 53 of the Vienna Conventions strongly suggests that jus cogens transcends the law of treaties and applies more broadly to the whole range of State practice.[39] In short, the Vienna Conventions place jus cogens firmly at the conceptual pinnacle of international law.

As clear as they may be on the jurisprudential standing of jus cogens, the Vienna Conventions do not adequately address a

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[38] A/CONF.39/27. These provisions were replicated verbatim in the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.

[39] See also article 29 of the Commission's draft articles on State Responsibility (Part One) which declares that States acting in violation of a peremptory norm of international law may not be released from responsibility: Yearbook of the International Law Commission, 1980, vol. II (Part Two), p. 33.

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second, more basic area of concern -- namely, the nature of peremptory norms. In its draft articles on the Law of Treaties, the International Law Commission chose to leave the full content of jus cogens "to be worked out in State practice and in the jurisprudence of international tribunals."[40] Regrettably, the expected elucidation has not been forthcoming.[41] Although the concept is solidly a part of international law, the International Court of Justice has to date avoided decisively grounding any of its decisions on a principle of jus cogens. Arguably waiting for further guidance, the Court has only sympathetically noted various assertions that certain norms may constitute jus cogens to support its conclusions on other grounds.[42] As to State practice, despite near unanimous support for jus cogens in the international community, the prediction by one delegate to the Vienna Conference that "what might be jus cogens for one State would not necessarily be jus cogens for another" has in large part proven correct.[43]

Among the most central, unanswered questions surrounding jus cogens are: by what means does a norm of international law rise to the level of jus cogens? How may one distinguish such a norm from other more ordinary principles of international law? How may one peremptory norm come to replace another? What are the possible candidates for jus cogens today? All in all, the remarkable lack of certainty prevailing over these and other issues has precluded the effective utilization of jus cogens in contemporary international jurisprudence. As the birthplace of jus cogens in codified international law, the International Law Commission, in conjunction with the Sixth Committee, offers an excellent and highly qualified forum to authoritatively clarify these ambiguities.[44]

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[40] Yearbook of the International Law Commission, 1963, vol. II, p. 53.

[41] For an excellent and brief critique of the existing, unfocused state of jus cogens jurisprudence, see Anthony D'Amato, "It's a Bird, It's a Plane, It's Jus Cogens!" Connecticut Journal of International Law, vol. 6, No. 1 (1990), p. 1.

[42] In the Military and Paramilitary Activities In and Against Nicaragua case, for example, the International Court of Justice invoked the frequently heard argument that the prohibition on the use of force contained in Article 2(4) of the United Nations Charter represents jus cogens to support its contention that the same principle exists under customary law: Judgment of 27 June 1986: I.C.J. Reports 1986, p. 100, para. 190; Gordon A. Christenson, "The World Court and Jus Cogens," American Journal of International Law, vol. 81, No. 1 (1987), p. 93. To be sure, individual justices of the Court have on occasion made bolder statements in support of jus cogens in their separate or dissenting opinions, but these cannot be said to speak for the Court as a whole. Sztucki, op. cit., pp. 12-22 and Ian Sinclair, The Vienna Convention on the Law of Treaties (Manchester, England, Manchester University Press, 1984), pp. 209-215.

[43] The representative was that of the United Kingdom: United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March - 24 May 1968, Official Records, (A/CONF.39/11), p. 305.

At the forefront of the uncertainty are the related matters of how ordinary legal norms reach peremptory status and what qualities set them apart from the balance of international law. The Commentaries to the Commission's 1963 draft articles on the Law of Treaties provide little guidance.[45] Nonetheless, from the remarks of Sir Humphrey Waldock at the Vienna Conference and the text of the Vienna Convention itself, one may extract the germ of a test. In Sir Humphrey's words, the International Law Commission "based its approach to the question of jus cogens on positive law much more than on natural law."[46] To this end, article 53 imples a consensual requirement of acceptance and recognition by "the international community of States as a whole" before a candidate norm may actually become *jus cogens*. What remains unclear in this formulation, however, is the precise shape this consensus must take and whether it has the power to impose obligations *erga omnes* on dissenting States.

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[44] The International Law Commission introduced jus cogens to codified international law in article 15 of Sir Hersch Lauterpacht's First Report on the Law of Treaties: Yearbook of the International Law Commission, 1953, vol. II, pp. 154-156. For a discussion of the genesis and evolution of jus cogens in the Commission, see V. Nageswar Rao, "Jus Cogens and the Vienna Convention on the Law of Treaties," Indian Journal of International Law, vol. 14 (1974), p. 362 and Egon Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission," American Journal of International Law, vol. 61 (1967), p. 946.

The language of jus cogens continues to pervade the work of the Commission even today. Article 19 of Part One of the draft articles on State Responsibility, for example, describes international crimes in terms of the breach of an obligation "essential for the protection of fundamental interests of the international community": Yearbook ... 1976, vol. II (Part Two), p. 75. During the discussions on the Draft Code of Offenses Against the Peace and Security of Mankind, one member of the Commission suggested framing the proposed universality of the Code by saying that "an offence against the peace and security of mankind was a breach of rules recognized by the international community as a whole, from which no State could derogate": Yearbook ... 1987, vol. I, p. 12.

[45] According to the Commentary to draft article 13, for example, there is no simple criterion by which to identify a general rule of international law as having the character of jus cogens: Yearbook of the International law Commission, 1963, vol II, p. 52.

The phrase "the international community of States as a whole" has, in practice, generally been interpreted to mean something less than absolute unanimity. In 1976, for example, the International Law Commission suggested that acceptance and recognition "by all the essential components of the international community" was sufficient to elevate the breach of an obligation to the level of an international crime.[47] Under this formula, the dissent of one State or even a small group of States, no matter how powerful, could block the formation of a new peremptory norm. Similarly, and more to the point, the Chairman of the Drafting Committee at the Vienna Conference, Mr. Mustafa K. Yasseen, stated that "[t]here was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so ..."[48]

Others, by contrast, have argued that to allow majorities to bind dissenting States would conflict with already well-established principles of international law.[49] The French representative to the Vienna Conference expressed the view that if consensus was "interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result would be to create an international source of law subject to no control and lacking all responsibility."[50] This claim finds support in both judicial doctrine and State practice. The *Military and Paramilitary Activities In and Against Nicaragua* opinion of the International Court of Justice maintains, for example, that in international law, there are no rules, other than such rules as may be accepted by the States concerned.[51] Furthermore, an attempt by many developing States in the General Assembly and at the United Nations Conference on the Law of the Sea to elevate the concept of "the common heritage of mankind" to peremptory status failed after a small group of primarily Western nations refused to endorse the proposal.[52] The representative of the United States expressed the

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[46] United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March - 24 May 1968, *Official Records*, (A/CONF. 39/11), p. 327.

[47] *Yearbook of the International Law Commission, 1976*, vol II (Part Two), p. 119. Roberto Ago expressed a similar view with respect to *jus cogens* in Roberto Ago, "Droit des traités à la lumière de la Convention de Vienne," *Recueil des cours de l'Académie de droit international de La Haye*, vol. 134, (1971-III), p. 323.

[48] United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March - 24 May 1968, *Official Records*, (A/CONF.39/11), p. 472.

[49] Perhaps the seminal article in this regard is Georg Schwarzenberger, "International Jus Cogens?" *Texas Law Review*, vol. 43 (1965), p. 455.

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[50] United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April - 22 May 1969, *Official Records*, (A/CONF.39/11/Add. 1), p. 94. See Michel Virally, "Réflexions sur le 'jus cogens'," *Annuaire français de droit international*, vol. 12 (1966), p. 5.

[51] Previously cited, *I.C.J. Reports 1986*, p. 135. It is important to note that while the ICJ has on occasion referred to *jus cogens* abstractly, it has cautiously declined to invoke the concept as a dispositive ground for any of its decisions or to authoritatively identify possible candidates for peremptory status. By contrast, in 1965, the German Supreme Constitutional Court specifically endorsed *jus cogens* and offered its own definition of peremptory norms as "such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community." 18 B VerfGE 441, p. 448 (1965). See also, Stefan A. Riesenfeld, "*Jus Dispositivum* and *Jus Cogens* in International Law: In Light of a Recent Decision of the German Supreme Constitutional Court," *American Journal of International Law*, vol. 60, No. 3 (1966), p. 511. In the United States, Federal courts in the Ninth Circuit and the District of Columbia have confirmed the presence and relevance of *jus cogens* in international law: *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), *Siderman de Blake v. The Republic of Argentina*, 965 F.2d 699, p. 717 (9th Cir. 1992) and *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, p. 940 (D.C. Cir. 1988).

[52] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, (A/Res. 2749 (17 December 1970) in the *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 28 (A/8028)*, p. 24). Chile proposed at the Conference on the Law of the Sea to introduce a draft article into the Convention attesting to the peremptory nature of the common heritage principle. Third United Nations Conference on the Law of the Sea: Documents, (Renate Platzöder, ed.), vol. 12 (1987), p. 302. See also Gennady M. Danilenko, "International *Jus Cogens*: Issues of

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view that "[t]he United States could not accept the suggestion that, without its consent, other States would be able, by resolutions or statements, to deny or alter its rights under international law."[53] In the end, no compelling resolution of these two conflicting approaches to the question of consensus has yet emerged and the topic remains controversial.[54]

The question of how one peremptory norm may replace another has also raised considerable debate. As jus cogens, by its very nature, prohibits countervailing State practice, any attempt to alter the existing peremptory normative order may entail violations of international law. This will especially be the case where jus cogens arises by way of international custom. A commonly proposed solution to this conundrum involves creating and substituting peremptory norms only through the mechanism of general international treaties or conventions.[55] These instruments would, of course, be subject to the requirement of broad consensus mentioned above and should also contain a clear expression of the international community's intent to modify existing peremptory law. Anything short of such a decisive statement might encounter serious doctrinal and practical difficulties.

A final principal area of uncertainty revolves around the identification of candidates for jus cogens status. In its Commentary to the draft articles on the Law Treaties, the International Law Commission stated that "[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of

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Law-Making," European Journal of International Law, vol. 2, No. 1 (1991), pp. 42, 59; Robledo, loc. cit., p. 9.

[53] Third United Nations Conference on the Law of the Sea, Seventh Session, 28 March - 19 May 1978 and Resumed Seventh Session, 21 August - 15 September 1978, Official Records, vol. IX, p. 104.

[54] Danilenko, loc. cit., pp. 42, 64. Related to the debate over consensus is also the question of whether jus cogens may arise at a regional or sub-global level. Although the Vienna Conventions apparently contemplate only broad-based peremptory norms, the fact that international custom has been recognized as susceptible to regional evolution has led some to suggest a similar process for jus cogens. Certainly nothing in the Conventions explicitly precludes such a mechanism.

[55] See, e.g., the Commentary to the Commission's draft article 13 on the Law of Treaties. Yearbook of the International Law Commission, 1963, vol. II, p. 54.

the Commission, give it the character of jus cogens."[56] The Commission declined at the time to endorse any specific examples of jus cogens out of fear that such a list might prejudice the consideration of other potential peremptory norms and deflect the attention of the International Law Commission from the draft articles before it.[57] It did, however, suggest possible examples, including: a prohibition on the use of force; a prohibition on acts constituting international crimes; and proscriptions against slavery, genocide and piracy.[58] Among other broadly-supported possibilities are the obligation to settle disputes peacefully and the international princple prohibiting torture.[59] Indeed, because jus cogens offers a powerful vehicle for the transformation of contemporary international law, some have suggested the incorporation of principles as diverse as the Brezhnev Doctrine and the right to life into the concept.[60] Clearly, some distinctions

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[56] Yearbook of the International Law Commission, 1966, vol. II, p. 248, para. (2) of the Commentary.

[57] Ibid., para. (3) of the Commentary.

[58] Ibid. Some of the other more serious contenders are considered in Schwelb, loc. cit., p. 946 and Hannikainen, op. cit.

[59] Mr. Gaetano Arangio-Ruiz recently discussed peremptory norms in his Third and Fourth Reports on State Responsibility. He reached the conclusion that the prohibitions against the use of force and against massive violations of human rights both raised questions of jus cogens. In draft article 14 appearing in his Fourth Report, Mr. Arangio-Ruiz also proposed to prohibit countermeasures "contrary to a peremptory norm of general international law": Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), pp. 73-99; Arangio-Ruiz, Third Report on State Responsibility, A/CN.4/440/Add. 1), pp. 24-25; Arangio-Ruiz, Fourth Report on State Responsibility, (A/CN.4/444/Add. 1), pp. 29-34. A line of recently decided cases in United States Federal courts has recognized that the international prohibition against torture is a norm having the character of jus cogens: Trajano v. Marcos, Siderman de Blake v. The Republic of Argentina and Committee of United States Citizens Living in Nicaragua v. Reagan (see footnote 51 above).

[60] G. I. Tunkin, Theory of International Law, (Cambridge, Mass., Harvard University Press, 1974), p. 444 and Karen Parker & Lyn Beth Neylon, "Jus Cogens: Compelling the Law of Human Rights," Hastings International and Comparative Law Review, vol. 12, No. 2 (1989), p. 411. In the context of international environmental law, an Uruguayan diplomat recently argued that the principles of conduct, responsibility and compensation arising from the Stockholm Declaration and reaffirmed in the Rio Declaration are true criteria of jus cogens valid erga omnes: Statement by Dr. Miguel Langon,

must be drawn. The further proliferation of competing norms will only contribute to the confusion surrounding _jus cogens_ and may sap the concept of its credibility, elegance and power. Alternatively, and by far preferably, the elucidation and crystallization of _jus cogens_ would mark a substantial step forward in the progressive development of an already integral and well-established segment of international law. It is submitted that the International Law Commission, in combination with the Sixth Committee, is uniquely suited to this task.

See in this connection the article entitled "Treaties Conflicting with Peremptory Norms of International Law" by Andreas J. Jacovides[61]

STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

AND

STATE SUCCESSION IN RESPECT OF MEMBERSHIP TO INTERNATIONAL ORGANIZATIONS

OUTLINES BY MR. VACLAV MIKULKA

Introduction: Historical review of the work of the Commission on the topic of State Succession

At its first session in 1949, the International Law Commission listed the topic "Succession of States and Governments" among the fourteen topics selected for codification. The topic was later divided into three headings:

(a) Succession in respect of treaties;

(b) Succession in respect of rights and duties resulting from sources other than treaties;

(c) Succession in respect of membership of international organizations.

Questions falling under the first heading, studied by the

Special Representative of the National Commission for the Environment of Uruguay to the Economic and Social Council of the General Assembly, on the Report of the United Nations Conference on Environment and Development, 5 November 1992, (A/47/PV.57).

[61] This article is reproduced as an Annex to the present document.

International Law Commission from 1967 to 1974, were resolved by the adoption of the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978.[62]

The second heading, in view of its breadth and complexity, was narrowed to the economic aspects of succession, namely, to the succession in respect of State property, archives and debts. This heading was studied by the Commission from 1968 to 1981 and led to the adoption of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 7 April 1983.[63]

A study of the third heading has never been undertaken by the International Law Commission.

1. STATE SUCCESSION AND ITS IMPACT ON THE NATIONALITY OF NATURAL AND LEGAL PERSONS

The problem of the nationality of natural and legal persons was part of the second heading of the topic of State succession as originally proposed by the International Law Commission. Some preliminary comments on it were made in the Commission during the debate on the first report by the Special Rapporteur at the twentieth session of the Commission.[64] Nevertheless, nationality was not included among the issues coming under the narrowed heading.

(a) Nationality laws of successor States

According to the prevailing opinion, State succession does not result in a automatic change of nationality. It is the prerogative of a successor State to determine on its own whom it claims as its nationals, and to indicate the methods through which its nationality is acquired.

In this connection, reference is made to the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930.[65] Article 1 provides:

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[62] United Nations Conference on Succession of States in Respect of Treaties, Vienna, 4 April - 6 May 1977 and 31 July - 23 August 1978, Official Records, vol. III, (A/CONF.80/16/Add. 2).

[63] A/CONF.117/14.

[64] See First Report by Mr. Mohammed Bedjaoui, Special Rapporteur, document A/CN.4/202, Yearbook of the International Law Commission, 1968, vol. II, pp. 114-115 and document A/7209/Rev. 1, paras 73 and 78, in ibid., pp. 220-221.

> "It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international customs, and the principles of law generally recognized with regard to nationality."

Also of relevance to this issue is the Code of Private International Law (Bustamante Code) of 1928.[66] In article 13 it is stated:

> "In collective naturalizations, in case of the independence of a State, the law of the acquiring or new State shall apply, if it has established in the territory an effective sovereignty which has been recognized by the State trying the issue, and in the absence thereof that the old State, all without prejudice to the contractual stipulations between the two interested States, which shall always have preference";

and, in article 20:

> "Change of nationality of corporations, foundations, associations and partnerships, except in cases of change of territorial sovereignty should be subject to the conditions required by their old law and the new.
>
> "In case of change in the territorial sovereignty, owing to independence, the rule established in Article 13 for collective naturalizations shall apply."

In addition, there are a number of publications relevant to this issue.[67]

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[65] League of Nations, Treaties Series, vol. CLXXIX, No. 4137, p. 89.

[66] League of Nations, Treaties Series, vol. LXXXVI, No. 1950, p. 254.

[67] See R. Graupner, Nationality and State Succession, Transactions (1946); Hans Kelsen, "Théorie générale du droit international public," Recueil des cours de l'Académie de droit international de La Haye, vol. 42 (1932-IV), pp. 314 and 325-327; Paul Weis, Nationality and Statelessness in International Law, 2nd ed. (Germantown, Maryland, Sijthoff-Noordhoff, 1979), p. 242; and

The legislative competence of the successor State must be exercised within the limitations imposed by general international law as well as international treaties. These limitations have different characteristics and are derived from:

(i) The principle of effective nationality, according to which, for nationality to be acknowledged by other States, there must be a real and effective link, a genuine connection, between the State and the individual concerned;[68]

(ii) The protection of human rights which makes questionable the techniques leading to the statelessness or any kind of discrimination. In this regard, one should mention the Universal Declaration of Human Rights,[69] article 15, paragraph 2, wherein it is stated that "[no] one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Also, mention should be made of the United Nations Convention on Reduction of Statelessness of 1961,[70] article 9, prohibiting the deprivation of nationality on racial, ethnic, religious or political grounds.

(b) International treaties concerning nationality in cases of State succession

(i) Criteria for the ipso facto acquisition of nationality

There were many cases in which the problem of criteria and other conditions for the acquisition of nationality of a successor State was solved by an international treaty, mainly on the basis of the criterion of the domicile or habitual residence. One example is the Versailles Treaty of 28 June 1919 between the Allied and Associated Powers and Poland, articles 4 and 6,[71] as well as some

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Lucius Caflisch, "La nationalité des societés commerciales en droit international privée," Annuaire suisse de droit international, vol. XXIV (1967), p. 155.

[68] See the Nottebohm case, Judgment of 6 April 1955: I.C.J. Reports 1955, pp. 22-3. See also the debates in the International Law Commission on elimination and reduction of statelessness, Yearbook of the International Law Commission, 1953, vol. I, pp. 180-1, 184, 186, 218, 237, 239.

[69] ST/HR/1/Rev. 4 (vol. I, Part 1).

[70] United Nations, Treaty Series, vol. 989, No. 14458, p. 175.

[71] International Legislation, M. O. Hudson, ed. (Washington, Carnegie Endowment for International Peace, 1931), vol. I, No. 3, p. 283.

other treaties.[72]

(ii) The loss of the predecessor's nationality

The peace treaties following the First World War contained provisions on the nationality that were similar to the Versailles Treaty noted above. At the same time, they provided for the recognition, by the conquered States, of a new nationality acquired *ipso facto* by their former nationals under the laws of the successor State and for the consequent loss of the allegiance of these persons to their country of origin.[73]

According to other instruments, the transfer of the territory does not necessarily have the consequence of an automatic acquisition of a new nationality and the loss of the original nationality. In this connection, the Inter-American Convention on Nationality, which was signed at Montevideo on 26 December 1933, article 4, is an example on point.[74]

This position, while defended by some authors, is rejected by others.[75]

(iii) The right of option

The right of option was provided for in an important number of international treaties, including several of those mentioned above or in instruments related thereto. In exceptional cases, this right was granted for a considerable period of time during which the affected individuals enjoyed a kind of dual nationality. In this regard, see the Evian Declaration (Algeria-France) of 19 March 1962.[76]

For the majority of authors the right of option can be deduced only from a treaty. Nevertheless, some authors tend to assert the existence of an independent right of option as an attribute of the principle of self-determination.[77]

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[72] "Laws Concerning Nationality," in the United Nations Legislative Series, ST/LEG/SER.B/4, p. 590 and subs.

[73] See ST/LEG/SER.B/4, pp. 586-589.

[74] Ibid., p. 585.

[75] See Eric Castren, "Aspects récents de la succession d'Etats," *Recueil des cours de l'Académie de droit international de La Haye*, vol. 78 (1951-I), p. 487.

[76] United Nations, *Treaty Series*, vol. 507, No. 7395, pp. 35 and 37.

(c) Problems arising in the recent State practice

After the Second World War, as regards the practice of States becoming independent and remaining within the British Commonwealth, the automatic acquisition of nationality was based on the technique of combining the *jus soli* and *jus sanguinis* criteria, supplemented in a few instances by the residence criterion. For the persons affected by the automatic acquisition of nationality, no option was provided. This practice had the advantage of avoiding disputes over the nationality of a particular person by reducing the possibilities of dual nationality and, at the same time, minimizing the possibility of persons becoming stateless.

The French system of acquisition of nationality did not have the same effect. The new States drew largely on the techniques of the French Code de la nationalité of 1945 which did not always fit the situation of a newly independent State. Moreover, as each State having chosen the test for "genuine links" according to its own particular inclinations, various nationality laws overlapped or left lacunae, thus favouring dual nationality or statelessness.[78]

Dismemberment of the Soviet Union give rise to a number of problems as far as the nationality laws of different new States are concerned. The refusal of certain new republics, which re-established their independence after 1990, to grant their nationality to the ethnic Russian population settled there during several decades of a large-scale migration of population between different republics of the former Union has created an incertitude in the legal status of hundreds of thousands of individuals.[79]

The situation could be even worse in some new States born on the former Yugoslav territory where the population is ethnically mixed, and the armed conflict is accompanied by an ethnic cleansing.

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[77] See Joseph L. Kunz, "L'option de nationalité," *Recueil des cours de l'Académie de droit international de La Haye*, vol. 31 (1930-I), p. 109 and subs. and Joseph L. Kunz, "Nationality and Option Clauses in the Italian Peace Treaty of 1947," *American Journal of International Law*, vol. 41 (1947), p. 622 and subs.

[78] See Karl Zemanek, "State Succession After Decolonization," *Recueil des cours de l'Académie de droit international de La Haye*, vol. 116 (1965-III), pp. 272-277.

[79] See George Ginsburgs,"From the 1990 Law on the Citizenship of the USSR to the Citizenship Laws of the Successor Republics (Part 1)," *Review of Central and East European Law*, vol. 18, No. 1 (1992), p. 1.

In Czechoslovakia, which is going through the process of dissolution, the problem could be easier due to the existence, since 1969, of a separate Czech and Slovak citizenship linking each Czechoslovak national to one of the two constituent republics, and thnaks to a quite liberal policy allowing the change of this citizenship together with the change of the habitual residence.

The transition of Hong Kong from British to Chinese rule, as of 1 July 1997, represents another problem concerning the status of the inhabitants.[80]

The recent tendency of putting the accent on the ethnic origin, when determining the criterion for granting the new State's nationality to the inhabitants, and ignoring the importance of the domicile criterion, is an alarming sign. This approach not only favours statelessness but in many respects is questionable on the basis of the fundamental human rights standards.

(d) The principle of continuous nationality

The rule of the continuity of nationality is a part of the regime of diplomatic protection. According to this rule, it is necessary that from the time of the occurrence of the injury until the making of the award, the claim belongs continuously and without interruption to a person having the nationality of the State bringing the claim forward. The essence of the rule is to prevent the individual choosing a powerful protecting State by a shift of nationality.

Neither the practice, nor the doctrine give a clear answer to the question whether the rule has a place in the cases of involuntary changes brought about by a State succession. There are good reasons to believe that in the case of State succession the rule may be modified.

In this connection, reference is made to the The Barcelona Traction, Light and Power Company, Limited case,[81] and also to The Panevezys-Saldutiskis Railway case.[82] Reference is also made to the

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[80] See Roda Mushkat, "The Transition from British to Chinese Rule in Hong Kong," Denver Journal of International Law and Policy, vol. 14, No. 2 & 3 (1986), p. 171 and Christine Chua, "The Sino-British Agreement and Nationality: Hong Kong's Future in the Hands of the People's Republic of China," UCLA Pacific Basin Law Journal, vol. 8, No. 1 (1990), p. 163.

[81] See footnote 5 above.

[82] Judgment of 28 February 1939, Permanent Court of International Justice 1939, Series A/B, No. 76.

See also Annuaire de l'Institut de droit international, Pablo Najera case,[83] wherein it is stated:

> "Dans le cas de changements collectifs de nationalité en vertu d'un titre de succession d'Etats, la situation juridique droit être appréciée d'une manière beaucoup moins rigide que ne le fait généralement la pratique arbitrale dans les hypothèses normales de changement individuel de nationalité par le fait volontaire de l'intéressé." (p. 488)

(e) The possible outcome of the work

The comprehensive examination of the State practice should reveal whether a set of principles concerning nationality in cases of State succession could be identified.

The clear statement of minimum standard criteria for "ex lege" acquisition of nationality could provide useful guidelines to legislators of new States that are in the process of drafting laws in this matter.

It could also facilitate the role of third States as far as the application of international treaties between them and a successor State is concerned. By virtue of the customary rules of international law, a large number of treaty rights and obligations are automatically binding on the successor State. The application of many such treaties directly concerns individuals, or more precisely nationals of the treaty parties. Some times there is a need for the application of these treaties even before the nationality law was adopted by the successor State. Thus a "preliminary" determination of the nationality of individuals or moral persons residing in the territory where the change of the sovereignty occurred becomes the pre-condition for the continued application of the mentioned treaties.

The possible outcome of the work of the International Law Commission on this subject could be a study in the form of a report or a draft declaration to be adopted by the General Assembly. The elaboration of a draft convention, on the other hand, might be subject to the risk of facing the same kind of problems the

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vol. 36-II (1931), pp. 201-212, ibid., vol. 37 (1932), pp. 479-529 and ibid., vol. 51-II (1965), p. 261; and Eric Wyler, La regle dite de la continuité de la nationalité dans le contentieux international, (Paris, Presses universitaires de France, 1990), pp. 19-30, 11-118.

[83] Décision de 1928, Recueil des sentences arbitrales, vol. V, No. 30-A, p. 466.

Commission was facing during the work on the previous State succession topics (the length of the codification work, the problem of application of the convention in respect of the new States as non-parties to it, etc.).

2. STATE SUCCESSION IN RESPECT OF MEMBERSHIP TO INTERNATIONAL ORGANIZATIONS

The last of the three headings on the topic of State succession entitled "Succession in respect of membership of international organizations" has never been studied by the Commission. Nevertheless, the Secretariat prepared a memorandum on the problem of succession of States in relation to membership in the United Nations and submitted it in 1962, for the use of the Commission. There were only a few significant cases at that time on which the memorandum focused: the admission of Pakistan to the United Nations in 1947, the formation in 1958 of the United Arab Republic, the departure of Syria from this union in 1961 and the admissions of Mali and Senegal in 1960.

The legal rules to which the States coming into existence through division of a Member State of the United Nations should be subject were formulated by the Sixth Committee, during the Second session of the General Assembly.[84]

Recently, there were several new cases of State succession in which the problem of the membership in international organizations, or rather problems derived from the predecessor State's membership in international organizations, emerged. While in the case of unification of Tanzania and Zanzibar, the two Yemens or Germany these problems were nearly unnoticed by the international community, they were discussed in connection with the dismemberment of the Soviet Union and Yugoslavia. They are acute again as a result of the dissolution of Czechoslovakia.

The problem of the relationship between the States concerned and the international organizations in the case of State succession has several aspects:

(a) The membership of a successor State in an international organization;

(b) The impact of the territorial changes on the membership of a predecessor State in an international organization in the cases where the predecessor continues to exist after the change;

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[84] See "The succession of States in relation to membership in the United Nations": memorandum of 3 December 1962 prepared by the Secretariat, (document A/CN.4/149 and Add. 1) in Yearbook of the International Law Commission, 1962, vol. II, pp. 101-105. See document A/C.1/212, Official Records of the General Assembly, Second Session, First Committee, Annex 14g, pp. 582-583.

(c) The partition between successors, or the predecessor and successor(s), of the obligations or rights resulting from the membership of the predecessor State in the organization;

(d) The status of the military and other observers, as well as national units of a predecessor State taking part in the peace-keeping operations, etc.;

(e) The validity of certificates, licences, etc., issued to the nationals of a predecessor State on the basis of its membership in the organization.

(a) The membership of a successor State in an international organization

The prevailing opinion is that membership of international organizations is a personal right to which, in principle, succession is not possible. According to this view, new States issued from territorial changes must acquire membership on their own behalf, if they so desire.

Nevertheless, there were considerable differences in the practice depending on the character of the territorial change. For example, unions formed from former Member States automatically became members of those international organizations in which their component parts were members before the merger. The number of these cases, nonetheless, does not affirmatively establish whether the membership of all component parts or just one of them is required.

The international organizations with less rigid membership requirements, like the Bern or Paris unions, or the Hague Conference on Private International Law, do permit succession even in cases where States are born from the dissolution of a former Member State or through secession. For pragmatic reasons, the succession in respect of membership was permitted, after the dissolution of the United Arab Republic, even within the United Nations.[65]

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[65] See above, memorandum of 3 December 1962 prepared by the Secretariat; Zemanek, loc. cit., pp. 244-252; and the note by the Permanent Bureau of the Hague Conference on Private International Law, doc. L.C.A. No. 38 (92) of 23 September 1992 which states, inter alia:

> "... the Republic of Slovenia having participated in prior sessions both within the framework of the Serbo-Croat-Slovene State (Fifth and Sixth sessions)

Some international organizations provided for the membership or associate membership of former dependencies possessing international personality. As the personality of the new State was identical with the personality of the former dependency, the former membership or associate membership remained unaffected. Although there was no automatic elevation towards the full membership, the organizations concerned have nevertheless worked out pragmatic solutions for a smooth transition in order to avoid an automatic lapse of associate membership upon accession to independence.[86]

(b) The impact of the territorial changes on the membership of a predecessor State

The Member State from which the new State has seceded or the Member State which is joined by another State or territories retains its membership, due to the identity of its legal personality, although the rights and obligations deriving from its membership may change.

Several questions connected with it, however, remain unanswered. They concern:

(i) The criteria for determining the identity of the legal personality of the Member State, i.e., the status of the State-predecessor;

(ii) The possibility for the organization to deprive, under certain conditions, the State-predecessor of its right to continue automatically the membership in the organization itself or in its bodies with the full representation;

(iii) The legal effects of an agreement between the predecessor State and successor State or States concerning the continuation of the membership in international organizations;

> and as part of the Socialist Federal Republic of Yugoslavia, a country which was itself admitted as a successor member of the Conference to the Serbo-Croat-Slovene State ... falls within the coverage of the first paragraph of Article 2 of the Statute. ... Nonetheless, it is possible that some States Members of the Conference do not share this point of view and think that Slovenia falls within the framework of Article 2, paragraph 2, and thus ought to be subject to the procedure for admission ..."

[86] See resolution WHA 14.45, World Health Organization, Fourteenth World Health Assembly, Official Records, New Delhi, 7-24 February 1961, No. 110, Part I, p. 19 and Food and Agriculture (FAO) Report of the 10th Session of the Conference, 31 October - 20 November 1959, (FAO C59/Report), pp. 266-268.

(iv) The obligation of the predecessor State to issue new credentials to its representatives in the organization (see, for example, the case of India in the United Nations after the secession of Pakistan);

(v) The right of predecessor State to maintain a special status within the organization (see, for example, the seat for the Russian Federation in the Security Council), etc.

In this connection, reference is made to a number of United Nations documents.[87]

(c) The partition between successors or the predecessor and successor States of the obligations and rights resulting from the predecessor's membership in the organization

The rights and obligations resulting from the membership in the organization have, in principle, a "personal" character and disappears with the membership itself (or remains entirely with the State-predecessor which continues to be a Member State of the organization), as for example the right to participate in the meetings, to vote, etc. Nevertheless, some obligations and rights of the State-predecessor connected with its membership have a different character and, in principle, could be shared by the successor States or the predecessor and successor States. While this sharing partition of the obligations and rights can be envisaged in a situation when successor States join the organization as its new members, it cannot be expected in the case when the successor States decide to stay outside the organization.

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[87] See General Assembly resolution 47/1 of 22 September 1992 entitled "Recommendation of the Security Council of 19 September 1992" concerning the membership of Yugoslavia (Serbia and Montenegro) in the United Nations and the participation of Yugoslavia in the work of the General Assembly, in Official Records of the General Assembly, Forty-seventh Session, Supplement No. 49, (A/47/49), and document A/47/485 containing the letter of the Legal Counsel of the United Nations, dated 29 September 1992, concerning this issue.

See also Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan of 6 August 1947, document A/C.6/161, Official Records of the General Assembly, Second Session, Sixth Committee, Annex 6c, pp. 308-310; or Alma Ata Declaration of 21 December 1991 between eleven republics of the former Soviet Union concerning the continuation of the membership of the Russian Federation in the international organizations in which the USSR was previously a member, (A/47/60, S/23329, Annex II); and the UN Press Release PM/473, 12 August 1974, concerning the submission of new credentials of the representative of India in the ECOSOC and in the Security Council, in memorandum, document A/CN.4/149 and Add. 1: Yearbook of the International Law Commission, 1962, vol. II, p. 102.

The examples of the obligations or rights of this character are following:

(i) The arrears of the predecessor's contributions to the budget or to the funds of the organization;

(ii) The contributions by the predecessor to the funds of the organization under the form of credits or advances (e.g., United Nations Working Capital Fund), or under the form of the non-reversible deposits (e.g., the entry fee under art. XXVIII of the Convention Establishing an International Organization of Legal Metrology (1955));

(iii) The shares in the property of the organization;

(iv) Projects under way (predecessor State being the recipient or the contributor of the project).

(d) The status of the military and other observers, units taking part in the peace-keeping operations, etc.

The interaction between international organizations and their Member States become more and more comprehensive and includes different forms of involvement of the Member States in the activities undertaken by the organization. An unexpected termination of the membership status resulting from the State succession on the side of the State providing the personnel for an observer or another mission or a unit for a peace-keeping operation may provoke problems concerning:

(i) The admissibility of the continued participation of the personnel (unit) in the mission (operation);

(ii) The responsibility for the command and financing of the unit.

(e) The validity of certificates, licences, etc., issued or required by the international organizations

There are different categories of certificates, licences and other documents issued or required by the specialized agencies or other international organizations in respect of nationals of their Member States participating in specific activities, such as civil aviation, maritime navigation, etc. The validity of these documents *vis-á-vis* third States depends on the membership of the State in the international organization. There is a need for the search of pragmatic solutions which could reduce the negative impact of even a short interruption of the membership status of the State in the international organization caused by the State succession.

The possible outcome of the work

The analysis by the International Law Commission of the practice of international organizations concerning the consequences of the State succession on the relationship between these organizations and the States concerned could lead to the elaboration of a report containing general outlines of the solution of different categories of problems which are in many respects common to many organizations.

Such a report could have, in itself, a unifying effect on the practice of international organizations. It could contain some recommendations which could be taken into account by the international organizations both in the elaboration or amendment of their respective instruments or internal regulations or in any particular case they will have to solve.

This matter is not convenient for codification in the form of a universal convention. The harmonization efforts have their limits due to the specific characteristics of each international organization as reflected in its constitution or in another basic instrument or in its internal rules.

THE LAW CONCERNING INTERNATIONAL MIGRATIONS
OUTLINE BY MR. GUILLAUME PAMBOU-TCHIVOUNDA

1.

(section 1)

The subject of migration would at first glance seem to obey a logic that excludes law. Migration is inherent in the life of species (plant, animal, human); it is their "natural" means of survival, whatever the kingdom to which they belong.

Between migration and law, there is as it were a relationship of precedence, of chronology, which marks the assertion of the former as a specific phenomenon before the potential, and therefore subsequent, application of the latter to it becomes possible. The mutual exclusiveness of the two is thereby rendered less absolute. Migration, particularly human migration, whether it takes place within or beyond the natural confines of States, is a social phenomenon. It therefore falls within the operational scope of the law. The propensity of the legal phenomenon to subsume the migratory phenomenon thus appears as natural as the latter's vitality, which constantly impels it to free itself from the domain of law.

(section 2)

The pairing is as old as the hills. The oldest international treaty, concluded between the Pharaoh Ramses II and the King of the Hittites -- whose text is still graven on the walls of Karnak in Thebes -- shows that 4,000 years ago, migratory movements were already governed by international agreements, that the conditions to which migrant workers were subject, in time of peace as in time of war, were the subject of regulation. The topic of migration of populations between sovereign, independent communities and its relationships with the law is a truly ancient one.

The contemporary age has in no way changed the structure of these relationships. Yesterday, international migration involved the political and legal orders of sovereign communities. Today it involves the order of the State and, as a corollary, that of those entities that owe their existence to the will of States.

The competence rationae personae of the State is exercised every time that, owing to a (chance) incident, the applicable rule has to be determined: that of the State of origin, of the State of transit, of the receiving State. International migration law thus has its historical setting: it is first strongly national in content before becoming the subject of international treatment, particularly through its applications in litigation or the procedures by which it is jointly forumulated. The periods of freedom or restriction of international migration that have punctuated the development of lawmaking on the subject from the sixteenth century to our own time illustrate the important place occupied by States, in that those who choose, or are compelled, to "migrate" are, at the outset, nationals of a State. They will fall within the competence rationae personae of the receiving State, sometimes by passing in transit through the territory of a third State.

(section 3)

Only very recently has international law, particularly treaty law, come to include the regulatory framework for international migration.

There are many factors which have influenced this outcome. Everywhere, the State has progressively established itself as the exclusive framework for determining the identity of populations without, however, managing to keep them firmly settled. The technological revolution, through the development of means of mass transport (by air, land and sea), has brought men once separated from each other by great distances increasingly closer together. State poverty, the product of unequal development on the planetary scale, has compelled many individuals from the Southern hemisphere to emigrate to the North in the hope of finding their happiness there. In terms of the initial motivation, there is no real difference between such South-North migration in search of a better life and the mass migrations from Europe to the New World (America, Australia, New Zealand) in the nineteenth century. State violence draws sizeable population masses out through loopholes scattered along the walls constituted by the borders. The survival of the species points up the element of fiction in all State power: it explains the universal dimension the refugee phenomenon has acquired today. The advent of first-generation international organizations has contributed to the production of a body of norms, based on humanitarian concerns (for refugees from Europe) and social concerns (by laying the foundations for the legal status of migrant workers), which international resettlement organizations, wherever they may have been established (Europe, Africa, America), will perfect and develop.

(section 4)

The legal framework for international migration therefore exists, but the geopolitics of migrations do not have the appearance of a completed construct.

The framework lacks conceptual homogeneity with regard to its subject-matter. The term "migration" does not appear even once in the Charter of the United Nations, adopted well after international migrations had begun to occur and the practice of the law on the subject was sufficiently established. Before the nineteenth century, there was no universally recognized international definition of the term "migrant." The International Labour Office had to turn to national legislations, after the First World War, in order to extract a definition of immigration and emigration. The migratory phenomenon as a whole cannot be considered without referring to a recommendation of the International Labour Conference of 1922, which covers the phenomena of emigration, immigration, repatriation, and the transit of emigrants upon leaving and returning.

However, international migration law does not offer a general concept of the phenomenon to which it applies. Its scope of application is fragmented. It involves: spontaneous migration, legally organized or authorized migration, forced or imposed migration, political migration, economic migration, seasonal migration, annual or multi-annual migration, continental migration and trans-oceanic migration.

Moreover, the disputed issue of whether the concerns relating to migration are domestic or international has not been resolved. Undeniably, some of them involve countries of emigration only (nationality, passport, health), while others involve countries of immigration only (entry, exit, naturalization of migrants): these are domestic concerns. On the other hand, there are questions that are international in scope: those of transit and transmigration, those concerning the applicability of national legislation in foreign territory, those specifically covering citizens already living in foreign territory (refugees, expelled persons, stateless persons) and those relating to alien workers employed outside their countries but basically intending to return.

This fragmentation of the issue of international migrations necessarily calls for an overhaul of the applicable regime from unified, global perspective. From the standpoint of how it would be enacted, this regime needs to be harmonized. International coordination structures would guarantee its effective implementation.

2.

(section 5)

Treaties, general principles, relevant national legislative texts or court decisions concerning international migration law have been complied in two volumes by Professor Richard Plender. The first volume, entitled Basic Documents on International Migration Law (411 pages), was published by Martinus Nijhoff Publishers, third edition, 1988.[88] The second volume, put out by the same publishing house, also in 1988, is 587 pages long.[89] It expands on the first one, for in addition to national and international jurisprudence (p. 487), it catalogues the legislation of States (p. 519), and treaties and other international instruments from 1793 to 1986 (p. 557).

These two works form a basic reference to this topic.

(section 6)

Since this double reprinting, a number of national or international texts have appeared: (1) Treaties- the French-Spanish agreement of 8 January 1988 concerning clandestine immigration; the agreement between the Government of the Kingdom of Spain and the Government of the French Republic concerning admission of illegal aliens at border posts; the convention on the determination of the State responsible for reviewing an application for exile presented in one of the States Members of the European Community, signed in Dublin on 15 June 1990; the convention implementing the Schengen Agreement of 4 June 1985 concerning the

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[88] Richard Plender, ed., Basic Documents on International Migration Law (Dordrecht, The Netherlands, 1988).

[89] Richard Plender, International Migration Law (Dordrecht, The Netherlands, 1988).

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gradual elimination of common border controls, signed on 19 June 1990; the Treaty on European Union, or Maastricht Treaty, signed on 7 February 1992. (2) National legislative texts- United States Immigration Act of 6 November 1986 (entered into force on 5 May 1987); the "measures" aimed at limiting the number of asylum-seekers in the Federal Republic Republic of Germany adopted by the (West German) Parliament on 13 November 1986; the Italian law of 27 January 1987 fixing the "norms regarding placement and treatment of workers who are not from a Member State of the Community and against clandestine immigration." (3) Court decisions- by the Constitutional Council (France) of 25 June 1991 concerning the law authorizing the adoption of the convention implementing the Schengen Agreement; by the Court of Justice of the European Communities, 9 July 1987 (joined cases 281, 283, 284, 285 and 287/85). (4) Miscellaneous- Report of the Committee on Legal Affairs of the European Parliament, adopted on 23 February 1987 on the limitations to be imposed on the exercise of the right of asylum.

3.

(section 7)

In connection to this topic, there is an existing body of doctrine.[90]

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[90] (a) Books: Pierre Georges, Les migrations internacionales (Paris, Presses universitaires de France, 1976); Guy S. Goodwin-Gill, International Law and the Movements of Persons between States (Oxford, Clarendon Press, 1978); and Richard Plender op. cit.

(b) Studies: Jorge Balan, Las migraciones internacionales en el Cono Sur (Geneva, CIM, 1985); Ramiro Cardona, Migraciones internacionales de los paises del Pacto Andino (Geneva, CIM, 1985); Suzy Castor, Migracion y relaciones internacionales (Santo Domingo, Universidad Autonoma de Santo Domingo, 1989); Nicole Catala, Communauté economique européenne, jurisclasseur droit international (1990) Fasc. 611, Nos. 9 à 12; Julien Condé, Les migrations internationales Sud-Nord (Paris, OECD, 1986), vols. 1 & 2; Julien Condé, Les migrations africaines dans la Communauté européenne (Paris, OECD, 1992); Raymond Sarraute, "Réfugié" Dalloz Encyclopédie Juridique, vol. II, p. 728; Eberhard Jahn, "Intergovernmental Committee for Migration," Encyclopedia of Public International Law, vol. 5 (1983), p. 41; and Eberhard Jahn, "Migration Movements," Encyclopedia of Public International Law, vol. 8 (1985), p. 377.

(c) Courses: Charles de Boeck, "L'expulsion et les difficultés internationales qu'en soulève la pratique, Recueil des cours de l'Académie de droit international de La Haye, vol. 18 (1927-III), p. 443; Stélio Séfériadès, "L'échange des populations, Recueil des cours ..., vol. 24 (1928-IV), p. 307; and Louis Varlez, "Les migrations internationales et leur réglementation," Recueil

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(section 8)

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des cours ..., vol. 20, (1927-V), p. 165.

(d) Collections: Migrazioni, *Affari sociali internazionali*, 1991; Les Mouvements de population, *Revue juridique et politique, indépendance et coopération*, 1980; Movimenti Migratori, *Politica internazionale*, 1991; La Migration, *Revue internationale des sciences sociales*, 1985; Les migrations internationales au Moyen-Orient, *Revue tiers-monde*, 1985; and Les travailleurs étrangers et le droit international, *Société française pour le droit international*, 1979.

(e) Articles: A. A. Afolayan, "Immigration and Explusion of ECOWAS Aliens in Nigeria," *International Migration Review*, vol. 22, No. 1 (1988), p. 4; Reginald Appleyard, "Migration and Development: Myths and Reality," *International Migration ...*, vol. 23, No. 3 (1989), p. 486; Hans Arnold, "The Century of Refugee - A European Century?" *Aussenpolitik*, vol. 42, No. 3 (1991), p. 271; Maurice Bertrand, "Menaces: entre l'imaginaire et le réel," *Trimestre du monde*, No. 3 (1991), p. 93; V. Dovonon, "L'O.I.T., l'O.N.U. et les migrations: Coopération ou conflit de compétence?" *Revue de droit international et de droit comparé*, vol. 66, No. 1 (1989), p. 24; Dennis Gallagher, "The Evolution of the International Refugee System," *International Migration ...*, p. 579; Jean-Pierre Gomane, "La pallette des périls," *Défense nationale*, vol. 43 (1987), p. 77; Jean-Pierre Hocké, "Réfugiés et migration: de la dérive européenne à l'urgence d'une action en accord avec les valeurs proclamées," *Cadmos*, (1990), p. 88; Rainer Hofmann, "Refugee Law in Africa," *Law and State*, vol. 39 (1989), p. 79; Charles Leben, "La circulation internationale des personnes et le droit international," *Annales de la faculté de droit et de sciences politique de Clermont-Ferrand*, vol. 65, No. 1 (1978), p. 629; Donatella Luca, "La notion de 'solution' au problème des réfugiés," *Revue de droit international, de sciences diplomatiques et politiques*, vol. 65, No. 1 (1987), p. 1; David A. Martin, "Effects of International Law on Migration Policy and Practice: The Uses of Hyprocrisy," *International Migration ...*, p. 547; Richard Perruchoud, "L'Organisation internationale pour les migrations," *Annuaire française de droit international*, vol. XXXIII (1987), p. 513; Gérard Prunier, "La communauté indienne d'ouganda, des origines à l'expulsion," *Le mois en Afrique*, (1981), p. 61; Larbi Talha, "La migration des travailleurs entre le Maghreb et l'Europe," *Revue française d'études méditerranéennes*, (1975), p. 65; and Love-More M. Zinyama, "International Migrations To and From Zimbabwe," *International Migration ...*, vol. 24, No. 4 (1990), p. 748.

(f) Reports: "Trends and Characteristics of International Migration since 1950," *Demographic Studies No. 64*, (ST/ESA/SER. A/64); and United Nations, "Conclusions on the International Protection of Refugees," Geneva, 1991.

Whether it culminates in a study, a report or a draft convention, the inclusion of the item "International Migration Law" in the programme of the work of the International Law Commission should not meet with any major objection. The Commission's task of submitting specific studies or reports to the General Assembly is, however, not as well known to the public -- even the specialized public -- as its task of elaborating draft conventions.

(section 9)

There is nevertheless one misunderstanding that needs to be cleared up. Regardless of any formal particularities it may have, the work of the International Law Commission is always the end-product of lengthy studies. The method of work is one thing; its principle is immutable. Another matter entirely is the nature of the final results, which is determined by the interest of the subject-matter at a given moment and therefore by a decision of the Commission itself.

Are report and draft articles two unrelated species? No, they are not. There are "topics and sub-topics on which the Commission has submitted final reports." Others, by contrast, have gone beyond that stage to attain the status of draft articles. Without necessarily pursuing the same objective (to inform and codify), a draft convention cannot be drawn up within the framework of the Commission without also drawing up a report, and, in that context, special rapporteurs work for an extended period, over the long term, unlike rapporteurs whose mandate is limited in time. From this standpoint, this "outline" or "summary" on the topic of international migration law is very much in the report genre, which clearly distinguishes it from that of the draft convention.

Lastly, regardless of their purpose (and because of it), the formal structure of these two genres is not the same. One can prepare any type of report on international migration law. However, one cannot write just any draft convention on it.

(section 10)

One might hesitate to embark on the preparation of draft articles on international migration law, considering that it is a topic governed by international law and on which, therefore, specific regulations already exist: there would be no need for progressive development or codification.

And yet there is no general legal concept of international migration. The development of the topic of international migration has taken place somewhere between international humanitarian law and international social law. The implementation of the rules defined by these two disciplines has remained narrowly subordinate to the authority of various national policies, unilaterally defined by States in the light of their own approach to the migration

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phenomenon, even when they claim to accept the primacy of international law because they belong to resettlement organizations. These are generally closed-door policies which affect the rights of other States and individuals; rights for general protection mechanisms need to be defined. A concept of international migration that would win the support of States and international organizations seems to be a prerequisite for designing such mechanisms and ensuring their effectiveness.

The elaboration of general concept implies the drawing up of a general convention on the principles and rules applicable to international population movements. The result would be to lessen the monopoly of High Commissioner for Refugees in this area. The involvement of non-governmental organizations such as the International Committee of the Red Cross (ICRC) and the International Organization for Migration (IOM) in this undertaking would not only enhance their role as the principal interlocutors of States, but would also give added impetus to their institutionalization. The effect of the legal and institutional fragmentation of international migration law would thereby be diminished, as the objective of the convention would be to replace that law by a more unifying regime established in the light of current trends with respect to international migratory movements. The need to adapt the classical rules to new kinds of problems should therefore determine the overall thrust of United Nations policy aimed at winning States' acceptance of a common regime of rules applicable to population movements.

The replacement of the concept of "migration" by that of population movements arises from a concern to grasp the reality of the phenomenon in all its diversity. This phenomenon has changed. How can the laws applicable to it be allowed to lag behind the movement itself? A general draft convention on the law applicable to international population movements would therefore be in keeping with this need to update, which responds to three sets of interests: those of States, those of persons and those of the international community.

A newly established world order of international migrations would find in the emerging new global world order a reference point going well beyond traditional idealism or abstraction. Direct, but orderly experimentation must accompany and sustain the world-wide conversion to democratic ideology, which lessens the illegal appearance of the right of intervention. It is this same spirit of solidarity, raised to the level of a principle, that, serving as justification for the intervention of one Government or States in the domestic affairs of another, would also justify the migration of a given segment of the population from one country to another without fear of not being accepted, even for a short time. The role of the law would then be to prevent arbitrary exclusions and provide legislative protection for corridors of transit, residence and -- why not? -- arrival. It would be seen that prevention rhymes with protection, the protection advocated by the doctrine (Bertrand, Hocké, Perruchoud) for migratory movements, which is, after all, the whole objective.

But in order to be realistic, a legal policy for international migration must be effectively supervised; control mechanisms must therefore be established. This is a necessity that stems from (or is linked to) the need to define institutional channels for managing migratory movements, from channels of assistance or financing to channels for settlement, reintegration or return. Restructuring the role of States (rights and obligations), involving existing regional organizations (for advisory services and assistance), identifying the partners, particularly at the international level, participating in the implementation of programmes to oversee migratory movements: a whole system of assigning and coordinating the missions and roles that would complete the preventive machinery, according to an integrated concept, in the same legal instrument.

THE LAW AND PRACTICE RELATING TO RESERVATIONS TO TREATIES

OUTLINE BY MR. ALAIN PELLET

(section 1)

The proposal to include in the long-term programme of work of the International Law Commission the topic "The legal effects to be given to reservations and objections to reservations to multilateral conventions" was made at the Forty-sixth session of the General Assembly, during the consideration by the Sixth Committee of the report of the Commission.[91] It was taken up by the Working Group on the long-term programme of work established by the Planning Group, which placed the topic "The law and practice relating to reservations to treaties" on the short list of topics which could be appropriate for study by the Commission."[92]

The Working Group had indicated that this topic "could be appropriate for a speedy incorporation into the Commission's agenda and might form the subject of an instrument of codification." The Planning Group, "while not disagreeing with that conclusion, decided not to make any recommendation at [that] stage and to revert to the matter after the prospects offered by other topics

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[91] A/CN.4/L.469, para. 422.

[92] Report of the Planning Group, A/CN.4/L.473/Rev. 1, para. 21.

[had] been assessed."[93]

1. Previous work by the Commission

(section 2)

On several occasions, the Commission was called upon to consider the question of reservations to treaties. It first did so during the preparation of the draft articles on the Law of Treaties, which would become the source for the Vienna Convention on the Law of Treaties, of 23 May 1969, articles 19 to 23 of which are devoted to reservations.[94]

(section 3)

After some hesitations, the text of these articles was reproduced, virtually word for word and with the same numbering, by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986.[95]

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[93] Ibid., para. 23.

[94] See, especially, Yearbook of the International Law Commission, 1951, vol. II, Report by Mr. James L. Brierly (A/CN.4/41), pp. 13-20; Yearbook ... 1953, vol. II, Report by Sir Hersch Lauterpacht (A/CN.4/63), pp. 101-143; Yearbook ... 1962, vol. II, First Report by Sir Humphrey Waldock, pp. 59-69, and appendix: "Historical summary of the question of reservations to multilateral conventions," pp. 73-80; Yearbook ... 1965, vol. II, Fourth Report by Sir Humphrey Waldock, pp. 15-16 and 45-56; ibid., Report of the Secretary-General, "Depositary practice in relation to reservations," pp. 74-107; and Yearbook ... 1966, vol. II, Report of the Commission to the General Assembly, p. 204 and pp. 218-226.

For a fuller listing of relevant works, see "Guide to the Draft Articles on the Law of Treaties Adopted by the International Law Commission at Its Eighteenth Session (1966)," (A/C.6/376), pp. 72-80; Pierre-Henri Imbert, Les réserves aux traités multilatéraux, (Paris, Pédone, 1979), pp. 489-492; and Shabtai Rosenne, The Law of Treaties: A Guide to the Legislative History of the Vienna Convention, (Leiden, A. W. Sijthoff, 1970), pp. 182-187.

[95] See, especially, Yearbook of the International Law Commission, 1975, vol. II, Fourth Report by Mr. Paul Reuter, pp. 35-39; Yearbook ... 1977, vol. II (Part Two), Report of the International Law Commission to the General Assembly, pp. 105-116; Yearbook ... 1981, vol. II (Part One), Tenth Report by Mr. Paul Reuter, pp. 56-64; ibid., vol. II (Part Two), Report of the Commission to the General Assembly, pp. 135-140; and Yearbook ... 1982, vol. II (Part Two), Report of the Commission to the General Assembly, pp. 32-37.

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(section 4)

The question of reservations is also the subject of article 20 of the Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978.[96]

2. The main problems raised by the topic through practice and doctrine

(section 5)

As Sir Hersch Lauterpacht noted in his first report on the law of treaties: "the subject of reservations to multilateral treaties is one of unusual -- in fact baffling -- complexity and it would serve no useful purpose to simplify artificially an inherently complex problem."[97]

Articles 19 to 23 of the 1969 Vienna Convention, which "are clearly one of the principal parts of the Convention, on account of both their technical preciseness and the great flexibility which they have introduced into the regime of multilateral conventions," could rightly be commended.[98]

Nevertheless, as the Commission noted, following its special rapporteur on the question of treaties between States and international organizations or between two or more international organizations,[99] "[e]ven in the case of treaties between States, the question of reservations has always been a thorny and controversial issue, and even the provisions of the [1969] Vienna

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[96] See, especially, Yearbook of the International Law Commission, 1970, vol. II, Third Report by Sir Humphrey Waldock, pp. 46-52; Yearbook ... 1972, vol. II, Report of the International Law Commission to the General Assembly, pp. 260-265; Yearbook ... 1974, vol. II (Part One), First Report of Sir Francis Vallat, pp. 50-55; and ibid., Report of the Commission to the General Assembly, pp. 222-227.

[97] Yearbook of the International Law Commission, 1953, vol. II, (A/CN.4/63), p. 124.

[98] Fourth Report by Mr. Paul Reuter on the question of treaties concluded between States and international organizations or between two or more international organizations, Yearbook of the International Law Commission, 1975, vol. II, p. 36.

[99] Yearbook of the International Law Commission, 1981, vol. II (Part One), p. 55.

Convention may not have eliminated all these difficulties."[100]

In general, authors share this view, and emphasize that the three relevant Vienna Conventions (1969, 1978 and 1986 -- see 1. above) have allowed major uncertainties to persist with regard to the legal regime applicable to reservations. Moreover, such uncertainties are well demonstrated by the often vacillating and unclear practice of States and international organizations.

(section 6)

The very abundance of literature devoted to reservations to treaties testifies to the fact that doctrine is consistently confusing with regard to problems which are highly technical and extremely complex, but of exceptional practical importance. "The question of reservations to multilateral treaties has been one of the most controversial subjects in contemporary international law."[101]

There is hardly any need to recall, in this connection, the abundance of articles devoted to reservations in works dealing with the law of treaties as a whole, and even in treaties and manuals on general international law.[102] To this already long, and yet quite incomplete list, should be added the large number of monographs devoted to the study of national practice in the area of reservatons, to reservations to a particular convention or a particular type of treaty, or to some specific issues. Some of these works will be mentioned below.

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[100] Yearbook of the International Law Commission, 1982, vol. II (Part Two), p. 32.

[101] Jose Maria Ruda, "Reservations to Treaties," Recueil de cours de l'Académie de droit international de La Haye, vol. 146 (1975-III), p. 95.

[102] See, especially, and only as examples of some of the standard works on the law of treaties: Suzanne Bastid, Les traités dans la vie internationale (Paris, Economica, 1985), pp. 71-77; Taslim O. Elias, The Modern Law of Treaties (Leiden, A. W. Sijthoff, 1974), pp. 27-36; Lord McNair, The Law of Treaties (Oxford, Clarendon Press, 1961), pp. 158-177; Paul Reuter, Introduction to the Law of Treaties (London and New York, Pinter Publishers, 1989); and Sir Ian Sinclair, The Vienna Convention on the Law of Treaties (Manchester, England, Manchester University Press, 1973), pp. 40-50 (second edition, 1984, cited above).

Since the adoption of the 1969 Convention, new, well-researched and thorough works have been added to the classic monographs dealing with reservations. Among the studies published prior to 1969, see, especially: D. R. Anderson, "Reservations to Multilateral Conventions: A Re-examination," The International and Comparative Law Quarterly, vol. 13 (1964), p. 450; William W. Bishop, Jr., "Reservations to Treaties," Recueil des cours de l'Académie de droit international de La Haye, vol. 103 (1961-II), p. 245; Gerald Fitzmaurice, "Reservations to Multilateral Conventions," The International and Comparative Law Quarterly, vol.

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2 (1953), p. 1; Kaye Holloway, Les réserves dans les traités internationaux (Paris, Librairie Génerale de Droit et de Jurisprudence, 1958); Dietrich Kappeler, Les réserves dans les traités internationaux (Basel, Switzerland, Verlag für Recht und Gesellschaft, 1958); H. William Malkin, "Reservations to Multilateral Conventions," British Year Book of International Law, vol. VII (1926), p. 141; Luis A. Podesta Costa, "Les réserves dans les traités internationaux," RDI, (1938), pp. 1-52; Christian Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties: Comments on Arts. 16 and 17 of the ILC's Draft Articles on the Law of Treaties," Zeitschrift für ausländisches öffentliches Recht and Völkerrecht, vol. 27 (1967), p. 463; and Edoardo Vitta, Le riserve nei trattati (Turin, G. Giappichelli, 1957).

Among the monographs published following the adoption of the 1969 Vienna Convention, see, especially: Dereck W. Bowett, "Reservations to Non-restricted Multilateral Treaties," British Year Book of International Law, vol. XLVIII (1976-1977), p. 67; Mohammed Ahsen Chaudri, "Reservations to Multilateral Treaties," Mélanges, R. Wilson (1970), pp. 40-52; Richard W. Edwards, Jr., "Reservations to Treaties," Michigan Journal of International Law, vol. 10, No. 2 (1989), p. 362; John K. Gamble, Jr., "Reservations to Treaties: A Macroscopic View of State Practice," American Journal of International Law, vol. 74 (1980), p. 372; V. F. Gubin, "Reservations in International Law" (in Russian, summary in English), Pravoedenie, No. 5 (1972), p. 84; Frank Horn, Reservations and Interpretative Declarations to Multilateral Treaties (Amsterdam, North-Holland Publishing Company, 1988); Imbert, op. cit.; Jean K. Koh, "Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision," Harvard International Law Journal, vol. 23, No. 1 (1982), p. 71; Rolf Kühner, Vörbehalte zu multilateralen Völkerrechtlichen Verträgen (Berlin, Springer-Verlag, 1986); Rafael Nieto Navia, "Las reservas a los tratodos multilaterales en la Convención de Viena de 1969," Rev. Universitas (Bogotá, June 1974), pp. 283-315; Joseph Nisot, "Les réserves aux traités et la Convention de Vienne du 21 mai 1969," Revue générale de droit international public, vol. LXXVII (1973), p. 200; Ernesto J. Rey Caro, "Las reservas de la Convención de Viena de 1969 sobre el derecho de los tratados," Revista de derecho internacional y ciencias diplomáticas (Rosario), (1972), pp. 168-225; Ruda, loc. cit.; and Renata Szafarz, "Reservations to Multilateral Treaties," British Year Book of International Law., vol. XLIV (1970), p. 293.

(section 7)

Within the necessarily limited framework of this submission, it would be impossible to provide an exhaustive overview of the issues raised by the legal regime applicable to reservations. Almost all that can be done is to make an imcomplete list of them, starting necessarily, with the Vienna Conventions of 1978, 1986 and, especially, 1969.[103]

For purposes of convenience -- but in a somewhat artificial manner -- the issues relating to: (a) the very existence of these conventions; (b) their ambiguities; and (c) their lacunae will be dealt with successively.

(a) Problems raised by the inclusion of provisions regarding reservations in the Vienna Conventions on the Law of Treaties

(section 8)

With the passage of time, the issue of whether the rules regarding reservations laid down in the 1969 Convention are an aspect of codification or of progressive development has become largely obsolete. On the other hand, there is no question that articles 19 to 23 broke new ground -- at times considerably in the view of some -- particularly by instituting an actual "presumption in favour of reservations."[104] But, on the other hand, in so doing these provisions have consolidated or "crystallized" earlier trends that were well under way.[105] "However, in the twenty years [and more] that have elapsed since the Vienna Convention was opened for signature, the rules regarding reservations stated in that Treaty have come to be seen as basically wise and to have introduced desirable certainty."[106]

Such consolidation -- a partial one (see section 9 below) -- was prompted by several factors, especially:

(i) The rules reflected the conditions of international society at the time they were adopted;

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[103] See Karl Zemanek, "Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties," Etudes de droit international en l'honneur du Juge Manfred Lachs (The Hague, Martinus Nijhoff, 1984), p. 323.

[104] Imbert, op. cit., p.87; see especially articles 20, paras. 5, and 21, para. 3.

[105] See, e.g., R. R. Baxter, "Treaties and Custom," Recueil des cours de l'Académie de droit international de La Haye, vol. 129 (1970-I), p. 48.

[106] Edwards, Jr., loc. cit., p. 365.

(ii) They were part of a general tendency to make multilateral conventions more flexible and more open;

(iii) They were, moreover, adopted almost unanimously at the Vienna Conference;

(iv) And included again in the 1986 Convention.

These considerations have led States to respect these provisions in the main, whether or not they ratified the Convention,[107] and even if, like France, they did not sign it, they have led international courts and arbitrators to perceive in the provisions the expression of customary rules. In this connection, reference is made to the decision of the Franco-British Court of Arbitration of 30 June 1977 in the case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (hereinafter referred to as the Mer d'Iroise case).[108]

(section 9)

This conclusion can, however, be maintained only with certain reservations:

(i) The formulations of the courts are not without some ambiguity:

- In the Mer d'Iroise case, the Court of Arbitration refers to the definition of a reservation in article 2, paragraph 1 (d), of the 1969 Vienna Convention, pointing out that it is accepted by both parties (paragraph 55), and seems rather to be making a correlation between the rules of general international law and those laid down in article 21, paragraph 3, of the Convention than to be taking a general position on the value of the Convention as codification (see paragraph 61);

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[107] See, e.g., in the case of the United Kingdom, the statements of Sir Ian Sinclair in American Society of International Law - Proceedings of the 78th Annual Meeting (1984), pp. 273-274 and, in the case of the United States, those of Robert E. Dalton, ibid., p. 278.

[108] Paras. 37-38 and 58-61, in Documentation française, 1977, pp. 52-53 and 70-73 in International Law Reports, vol. 54 (1979), pp. 35-36 and 44-45. Cf. Pierre-Henri Imbert, "La question des réserves dans la décision arbitrale du 30 juin 1977 ...," Annuaire français de droit international, vol. XXIV (1978), p. 29; A. E. Boyle, "The Law of Treaties and the Anglo-French Continental Shelf Arbitration," The International and Comparative Law Quarterly, vol. 29 (1980), p. 498; and Giorgio Gaja, "Unruly Treaty Reservations" in Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago (Milan, Drott. A. Giuffrè, 1987), vol. I, pp. 307-9.

- In the Temeltasch case, the European Commission of Human Rights considers that the Convention "primarily lays down rules that exist in customary law and is essentially in the nature of a codification." (emphasis added)[109]

(ii) Regardless of the fact that there are lacunae in the Convention on sometimes important points and that it could not foresee rules applicable to problems that did not arise at the time of its elaboration (see 2. (c) below), it served as a point of departure for new practices that at the present time are not, or not fully, followed with any consistency. (See the position of the Secretary-General of the United Nations regarding the time period within which States may raise objections to reservations: "the Secretary-General does not believe that he has any authority, in the absence of new instructions from the General Assembly, to adjust his practice to Vienna Convention rules which would be contrary to his present instructions."[110] As one author has written, "[c]alm has been introduced by the Vienna Convention on the Law of Treaties ... However, the Vienna Convention -- perhaps the most successful international effort at codification ever undertaken -- has not frozen the law. Rather, the rules in the Convention structure its future development."[111]

(iii) Lastly and most importantly, State practice on certain points, or the practice of some States, contradicts the very terms of the Convention of 1969. In this regard, see, especially, Giorgio Gaja, "Unruly treaty reservations," wherein the author examines successively, giving examples, the practices relating to:[112]

- reservations subsequent to ratification (pp. 310-

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[109] Decision of 12 October 1981, European Commission of Human Rights, Decisions and Reports, vol. 26, No. 9116/80, p. 217, (para. 68). Cf. Pierre-Henri Imbert, "Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (affaire Temeltasch)," Revue générale de droit international public, vol. 87, No. 3 (1983), p. 580 and Pierre-Henri Imbert, "Reservations to the European Commission on Human Rights before the Strasbourg Commission: The Temeltasch case," The International and Comparative Law Quarterly, vol. 33 (Part 3), (1984), p. 558.

[110] United Nations Juridical Yearbook, 1975, p. 204. See also United Nations ... 1981, p. 150.

[111] Edwards, Jr., loc. cit., p. 405.

[112] Gaja, loc. cit., passim, pp. 307-330.

312) (contrary to the provisions of article 2, paragraph 1 (d), and article 19 of the Convention);

- the disregard States have shown for the provisions of article 19 concerning inadmissible reservations (pp. 313-320), although it is true that the wording of this provision is ambiguous -- see 2. (b) below;

- the non-observance of the suspensive condition represented by the one-year time period before a State can become a party to the Convention as provided in article 20, paragraph 5 (pp. 320-324);

- the effect of objections to reservations (pp. 324-329) although, here again, the provisions of article 20, paragraph 4, seem particularly ambiguous.

The weight of these arguments varies. Nevertheless, they suggest a prudent approach and bar the conclusion that the rules applicable to reservations are absolutely clear-cut even on the points addressed by the Convention of 1969; the Convention of 1986, in connection with which the practice seems virtually non-existent.

(b) The ambiguities of the provisions regarding reservations in the Vienna Conventions on the Law of Treaties

(section 10)

Definition and scope of the reservations

Satisfactory in so far as it goes, the same definition of a reservation to be found in the Convention of 1969 (article 2, paragraph 1 (d)), the Convention of 1978 (article 2, paragraph 1 (j)) and the Convention of 1986 (article 2, paragraph 1 (d), has omissions causing uncertainties that can often by very awkward. The first point left in the dark, while more irritating in theory than important in practice, concerns the possibility of formulating reservations to bilateral treaties. The problem arises nevertheless, given the amendment by the Vienna Conference of the title of Part II, section 2, of the 1969 Convention ("Reservations" in place of "Reservations to multilateral treaties"); the ambiguity of the *travaux préparatoires*;[113] and the view of some authors who accept the fact that "reservations may come into play in theory" for bilateral treaties.[114]

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[113] See Edwards, Jr., loc. cit., pp. 402-05.

[114] See the Fourth Report of Mr. Paul Reuter on the question of treaties concluded between States and international organizations or between two or more international organizations, *Yearbook of the International Law Commission, 1975*, vol. II, p. 36.

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Of much greater practical concern is the distinction between reservations on the one hand and, on the other, the "interpretative declarations" that States seem to resort to with increasing frequency and on which the Conventions are silent.[115]

The conclusion to be drawn from recent judgements is that summaries must be set aside on this point and that an "interpretative declaration" must be taken to be a true reservation if it fulfils the definition given in the Conventions. In this connection, reference is made to the arbitral decision of 30 June 1977 in the Mer d'Iroise case (paragraph 55); the report of the European Commission of Human Rights on the Temeltasch case (paragraph 73); and the judgement of the European Court of Human Rights in the Belilos case of 29 April 1988,[116] or the decision of 8 November 1989 of the United Nations Human Rights Committee in the case of T. K. France.[117] But these decisions also testify to the fact that it is extremely difficult to make a distinction between "qualified interpretative declarations" and "mere interpretative declarations."[118] Furthermore, the legal effects of the latter remain unclear.

(section 11)

Determination of the validity of reservations

It is probably on this point that the ambiguity of the provisions of the 1969 and 1986 Vienna Conventions is most obvious. This ambiguity stems from both the vague wording of article 19 and the lack of precision, to say the least, of the mechanism for assessing the validity of reservations provided for -- or not provided for -- by the Conventions.

As Mr. Paul Reuter noted, "if the treaty is silent, the only prohibited reservations are those which would be incompatible with its 'object and purpose,' a concept again used by the Vienna

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[115] See, especially, D. M. McRae, "The Legal Effect of Interpretative Declarations," British Year Book of International Law, vol. XLIX (1978), p. 155.

[116] European Court of Human Rights Judgements and Decisions, Series A, vol. 132, paras. 40-49 - (Cf. Gérard Cohen-Jonathan, "Les réserves à la Convention européenne des droits de l'homme (à propos de l'arrêt Belilos du 29 avril 1988)," Revue générale de droit international public, vol. 93, No. 2 (1989), p. 273).

[117] CCPR/C/37/D/220/1987, Annex.

[118] McRae, loc. cit., p. 160.

Convention, although its interpretation remains as uncertain as when it first appeared in the Court's Advisory Opinion of 1951."[119]

These uncertainties are not dispelled, on the contrary, they are intensified by article 20, paragraph 2, which reintroduces the criterion of the object and purpose of the treaty with respect to multilateral treaties and seems to imply a contrario that "a reservation running counter to the object and purpose of a treaty may be authorized if it is accepted by all the parties."[120] Moreover, the very definition of these multilateral treaties is still extremely ill defined.[121]

These ambiguities would be a minor problem if, as the various Special Rapporteurs of the International Law Commission had proposed, the Conventions had defined the manner in which the compatibility of a reservation with the rules to which it relates was to be judged. This was not the case.[122] The Conventions leave each individual State to assess, in so far as it is concerned, the validity of a reservation, whether it is the author of the reservation or whether the reservation is by another State party to the treaty. Furthermore, article 20, paragraph 4 (b) shows that, except in the very rare cases where a State has made an objection by stating that it did not intend to be found in respect of the reserving State, the treaty enters into force between the two States concerned. The fact that this provision introduced by the Vienna Conference of 25 April 1969 runs counter to the draft of the Commission and, consequently, to the rest of the text that resulted from the draft[123] cannot be denied.

Be that as it may, the criteria for the validity of reservations set out in article 19 seem, under these circumstances,

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[119] Reuter, op. cit., p. 63.

[120] Ibid.

[121] See Imbert, op. cit., pp. 109-120 and, also, Jacques Dehaussy, "Le problème de la classification des traités et le projet de convention établi par la Commission du droit international des Nations Unies," Recueil d'études de droit international en hommage à Paul Guggenheim (Geneva, Institut Universitaire de Hautes Études Internationales, 1968), pp. 305-326.

[122] See Imbert, ibid., p. 93.

[123] See Zemanek, loc. cit., pp. 329-333.

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to be "a mere doctrinal assertion.[124] Such criteria amount to more than a doctrinal assertion only if an international court is competent to assess the validity of the reservation. In this connection, reference is made to the judgements of the European Court of Human Rights in the Belilos case (paragraphs 50-60), the Weber case of 22 May 1990[125] and the report of the European Commission of Human Rights of March 1991 on the Chrysostomos et al. case.[126]

(section 12)

Regime for objections to reservations

The underlying philosophy of the regime for objections to reservations adopted in 1969 and used again in 1986 is clear: it is to allow maximum flexibility; but, the regime is far from well defined and practice has brought its serious ambiguities to light.

The first of these ambiguities relates to the substantive scope of the objections. At the very least, an objection carries the consequence that "the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation."[127] However, it is not always easy to determine "the extent of the reservation" and difficult problems have arisen in this regard (particularly concerning objections to reservations made by a State to article 66 of the Vienna Convention and the effects of such reservations on the applicability of articles 53 and 64 between the States concerned.[128]

The interpretation of the 1969 and 1986 Conventions is just as difficult with regard to the admissibility and scope of objections to a reservation which is neither prohibited by the treaty nor contrary to its object and purpose. The solutions provided by practice are dubious, and doctrine provides diverse answers.[129]

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[124] Ruda, loc. cit., p. 390. See also Edwards, Jr., loc. cit., p. 390; Gaja, loc. cit., pp. 313-320; Imbert, op. cit., pp. 134-137; Reuter, op. cit., p. 74; etc.

[125] European Court of Human Rights Judgements and Decisions, Series A, vol. 177, paras. 36-38.

[126] European Commission of Human Rights, Decisions and Reports, (March 1991), RUDH (1991), p. 193.

[127] Article 21, para. 3, of the 1969 Convention.

[128] See Charles de Visscher, "Une réserve de la République Arabe de Syrie à la Convention de Vienne (1969) sur les traités," Revue belge de droit international, vol. VIII (1972-2), p. 416. Also see Edwards, Jr., loc. cit., p. 325 and Imbert, op. cit., pp. 265-267.

As a rule, however, States base their objections on the inadmissible nature of the reservations that they challenge. Here again, however, practice is inconsistent and there are divergent opinions. Some hold that reservations prohibited by the treaty nullify ratification, the State is therefore not party to the treaty and the objection is of a purely declaratory nature.[130] The prevailing doctrine, however, runs counter to this view and considers that article 21, paragraph 3, of the Vienna Convention makes no distinction between admissible and non-admissible reservations so that, somewhat paradoxically, "a simple objection (...) carries a value which is comparable only to that of an interpretative declaration."[131] The Court of Arbitration seems to have reached a similar decision in the case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (Mer d'Iroise case, paragraph 61).

(c) Lacunae in the provisions regarding reservations in the Vienna Conventions on the Law of Treaties

(section 13)

Effect of reservations on the entry into force of a treaty

This important and widely debated question has been the source of serious difficulties for the depositary and has not been answered in the relevant conventions. The practice followed in this area by the Secretary-General in his capacity as depositary, which was amended in 1975,[132] has been the object of rather harsh doctrinal criticism.[133]

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[129] Compare, for example, Bowett, loc. cit., pp. 86-87 and Zemanek, loc. cit., pp. 333-336.

[130] See Bowett, loc. cit., pp. 83-84.

[131] Reuter, op. cit., p. 75. Similarly, see Gaja, loc. cit., p. 327; Koh, loc. cit., pp. 102-103; Nisot, loc. cit. p. 203; Ruda, loc. cit., pp. 199-200; Sinclair, op. cit., pp. 76-77; and Zemanek, loc. cit. pp. 76-77.

[132] Cf. Repertory of Practice of United Nations Organs, Supplement No. 5, vol. V, covering the period 1 January 1970 to 31 December 1978, article 102, p. 162.

[133] See Imbert, op. cit., pp. 277-282 and "A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités -- Réflexions sur la pratique suivie par le Secrétaire Général des Nations Unies dans l'exercice de ses fonctions de

In addition, in an opinion given in 1982, the Inter-American Court of Human Rights expressed the view that a treaty came into force in respect of a State on the date of deposit of the instrument of ratification or accession, whether or not the State had formulated a reservation.[134] This position was accepted in some circles,[135] but other authors doubted whether it was compatible with article 20, paragraphs 4 and 5, of the Vienna Convention.[136] There are also grounds for asking whether the solution adopted by the Court reflects the specific nature of the Inter-American Convention rather than any general considerations (see section 19 below).

(section 14)

Problems connected with the specific object of certain treaties

Because of their general nature, the main codification conventions neglect, quite legitimately, the particular problems deriving from the specific object and nature of certain categories of treaty. Nevertheless, these problems occur very frequently in certain areas, particularly in connection with constituent instruments of international organizations on the one hand, and, on the other, treaties relating to human rights and, more generally, treaties which directly establish individual rights.

(i) Reservations to constituent instruments of international organizations

Although the conventions of 1969 and 1986 are not totally silent on this point, article 20, paragraph 3, is far from resolving all the problems which can and do arise:

- The concept of a constituent instrument is not an unequivocal one and it might be asked whether the rule set out in

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dépositaire," Annuaire français de droit international, vol. XXVI (1980), p. 524. See also Henry H. Han, "The U.N. Secretary General's Treaty Depositary Function: Legal Implications," Brooklyn Journal of International Law, vol. 14, No. 3. (1988), pp. 562-565.

[134] Advisory Opinion of 24 September 1982, Inter-American Court of Human Rights Judgments and Opinions, Series A, No. 2; International Law Reports, vol. 67 (1984), p. 559; International Legal Materials, vol. 22 (1983), p. 37.

[135] Cf. Shabtai Rosenne, Developments in the Law of Treaties, 1945-1986 (Cambridge, England, Cambridge University Press, 1989), pp. 435-436.

[136] See, especially, Edwards, Jr., loc. cit., p. 401, or Gaja, loc. cit., pp. 321-322.

article 20, paragraph 3, applies to any normative provisions such instruments may include.

- Does this rule include interpretative declarations and, if so, who determines their exact nature (see sect. 10 above)?

- What body is competent to accept reservations of this kind?

- What is the exact scope of such acceptance? In particular, are the other Member States bound by it and thus prevented from objecting to the reservation?[137]

(ii) Reservations to human rights treaties

Although it is extremely flexible, the general reservations regime is largely based on the idea of reciprocity,[138] a concept difficult to transpose to the field of human rights, or indeed to other fields.[139] As they are intended to apply without discimination to all human beings, treaties concluded in this field do not lend themselves to reservations and objections and, in particular, the objecting State cannot be released from its treaty obligations vis-à-vis citizens of the reserving State.

More so than other treaties, human rights treaties comprise monitoring mechanisms and the question arises as to whether these bodies are competent to assess the validity of reservations. The European Commission of Human Rights and the European Court of Human Rights have recognized their own competence in this area, because of the "objective obligations" deriving from the Convention of Rome of 1950.[140]

This gives rise to a third problem, namely, what effect does a reservation which has been declared invalid have on the participation in a treaty by the reserving State? In the Belilos case (paragraph 60), the European Court of Human Rights took the view that the reserving State remained, without question, a party to the convention.[141]

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[137] On all these points, see especially: Imbert, op. cit., pp. 120-134 and Maurice H. Mendelson, "Reservations to the Constitutions of International Organizations," British Year Book of International Law, vol. XLV (1971), p. 137.

[138] Cf. Judgment of 6 July 1957, Certain Norwegian Loans: I.C.J. Reports, 1957, p. 24.

[139] See Imbert, op. cit., pp. 250-260.

[140] See the Report of the Commission in the Temeltasch case (cited above), paras. 63-65 and, less clearly, the above-mentioned judgements of the Court in the Belilos case, para. 50, and the Weber case, para. 37.

The specific nature of the problems raised by reservations to treaties concerning human rights and humanitarian questions is also clearly apparent in the provisions of the relevant treaties, which have often been subject to differing interpretations.

There is an abundance of literature on this subject.[142]

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[141] See also the Report of the Commission in the *Chrysostomos* case, previously cited.

[142] See, especially: Angela Bonifazi, "La disciplina delle riserve allá Convenzione europea dei diritti dell'uomo," in *Les clauses facultatives de la Convention européenne des droits de l'homme* (Bari, Levante, 1974), pp. 301-319; Iain Cameron and Frank Horn, "Reservations to the European Convention on Human Rights: The *Belilos* Case," *German Yearbook of International Law*, vol. 33 (1990), p. 9; Antonio Cassese, "A new reservations clause (article 20 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination)," *Recueil d'études de droit international en hommage à Paul Guggenheim* (Geneva, Institut Universitaire de Hautes Études Internationales, 1968), pp. 266-304 (see also Antonio Cassese, "Una nuova clausola sulle riserve," *Rivista di diritto internazionale*, vol L (1967), p. 584 and "Su alcune 'riserve' alla Convenzione sui diritti politici della donna," *Rivista di ...*, vol. LI (1968), p. 294); Cohen-Jonathan, loc. cit.; Alberto Colella, "Les réserves à la Convention de Genève (28 juillet 1951) et au Protocole de New York (31 janvier 1967) sur le statut des réfugiés," *Annuaire français de droit international*, vol. XXXV (1989), p. 446; Rebecca J. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women," *Virginia Journal of International Law*, vol. 30, No. 3 (1990), p. 643; J. A. Frowein, "Reservations to the European Convention on Human Rights," *Mélange Wiarda* (Carl Heyman, Cologne, 1988), pp. 193-200; Pierre-Henri Imbert, "La question des réserves et les conventions en matière de droits de l'homme," *Actes du cinquième colloque international sur la Convention européenne des droits de l'homme* (Frankfurt, 9-12 April 1980, Paris, Pédone, 1982), pp. 97-139; Imbert, "Les réserves à la Convention européenne des droits de l'homme devant la Commission de Strasbourg (affaire Temeltasch)," loc. cit.; S. Marcus-Helmon, "L'article 64 de la Convention de Rome ou Les réserves à la Convention européenne des droits de l'homme," *Mélange Mosler* (1983), pp. 935-947; Claude Pilloud, "Les réserves aux Conventions de Genève de 1949," *Revue internationale de la croix-rouge*, vol. 39 (1957), pp. 409-437 - vol. 47 (1965), pp. 315-324 - vol. 58 (1976), pp. 131-149 and 195-221; and Isidoro Ruiz Moreno, "Reservations to Treaties Relating to Human Rights," *The International Law Association. Report of the Fifty-fourth Conference* (The Hague, 1970), p. 642 -- (debate pp. 596-625 - resolution p. XIV).

(section 15)

Reservations, codification treaties and customary rules

Curiously, the Conventions of 1969 and 1986 do not deal with the question of reservations to codification conventions or, to be more precise, clauses.

Opposing arguments can be put forward on this question. A reservation definitely cannot have any effect on States not parties to the codification treaty in respect of which the reserving State remains bound by the customary rule. This applies even more so to the signatory States to the treaty and this is generally the interpretation placed on the Judgment of the International Court of Justice of 20 February 1969 in the North Sea Continental Shelf cases.[143] However, it has been pointed out that this rule, which would be an additional criterion for non-validity of reservations under article 19, is debatable with regard to the intention of the parties to the Convention[144] and creates a regrettable confusion between jus cogens and jus dispositivum.[145]

(section 16)

Problems arising from certain specific treaty approaches

Because they were required to confine themselves to a very general level, the drafters of the Vienna Convention could not take account of certain specific treaty approaches, some of which developed rapidly from 1969 onwards. Two examples will suffice.

(i) Reservations and additional protocols

When an additional protocol supplements an existing convention, one of these instruments may contain a reservation clause and the other may not, or they may both contain such clauses, but the clauses may be incompatible. The situation is relatively rare, but does occur.[146] In addition, when ratifying

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[143] Judgment of 20 February 1969: I.C.J. Reports, 1969, pp. 38-39, para. 63.

[144] Reuter, op. cit., p. 82.

[145] On this difficult problem, see especially Gérard Teboul, "Remarques sur les réserves aux conventions de codification," Revue générale de droit international public, vol. 86 (1982), p. 679.

[146] Cf. the Convention of 1951 relating to the Status of Refugees, article 42, para. 1,(United Nations, Treaty Series, vol. 189, No. 2545, p. 137) and the Protocol of 1967, article VII, (ibid., vol. 976, No. 14151, p. 3), as well as the 1961 Single

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a protocol (or accepting an optional clause), a State may be tempted to formulate a belated reservation to the basic treaty.[147]

(ii) Reservations and the bilateralization approach

This approach, frequently taken in conventions relating to private international law, enables States parties to choose their partners and even to establish exceptional arrangements with them. Although used somewhat warily in the past (see article XXXV, paragraph 1, General Agreement on Tariffs and Trade[148]), the system spread rapidly in the 1970s in particular. Compare articles 21 and 23 of the Hague Convention on the Recognition and Execution of Foreign Judgements in Civil and Commercial Matters, of 1 February 1971,[149] and article 34 of the Convention on the Limitation Period in the International Sale of Goods, of 14 June 1971.[150] This flexible approach emerged as a "rival" to the reservations approach, but it also posed specific problems concerning the reservations stricto sensu which could be formulated concerning these conventions.[151]

(section 17)

Problems unresolved by the Convention of 1978 on Succession of States in respect of Treaties

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Convention on Narcotic Drugs (ibid., vol. 520, No. 7515, p. 151) and the Protocol of 1972 (ibid., vol. 976, No. 14151, p. 3), raising extremely tricky problems (see Imbert, op. cit., pp. 213-214, or Colella, loc. cit., pp. 451-452).

[147] Cf. Cohen-Jonathan, loc. cit., pp. 311-313; Gérard Cohen-Jonathan and Jean-Paul Jacque, "Activités de la Commission européenne des droits de l'homme," Annuaire français de droit international, vol. XXXVII (1991), pp. 562-565; or Claudio Zanghi, "La déclaration de la Turquie relative à l'art. 25 de la Convention européenne des droits de l'homme," Revue générale de droit international public, vol. 93 (1989), p. 69.

[148] United Nations, Treaty Series, vol. 55, No. 814, p. 188.

[149] Hague Conference on Private International Law, Collection of Conventions, (1951-1988), No. XVI, p. 107.

[150] A/CONF.63/15.

[151] On this question, see Imbert, op. cit., pp. 199-201 and, particularly, Ferenc Majoros, "Le régime de réciprocité de la Convention de Vienne et les réserves dans les Conventions de La Haye," Journal du droit international, vol. 101, No. 1 (1974), p. 73.

Article 20 of the Convention of 23 August 1978 scarcely deals with, and even less resolves, potential problems concerning reservations in the case of succession of States.

First, it should be noted that the article is contained in Part III of the Convention, which deals with "newly independent States"; it therefore applies in the case of the decolonization or dissolution of States, whereas the question of the rules applicable in the case of the succession of a State in respect of part of a territory, the uniting of a State or the separation of a State is left aside completely. It is true that, in the first instance, "treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates" (article 15 (a)). It is equally true that the extension of treaties of the successor State to the territory (article 15 (b)) appears to entail necessarily the automatic extension of reservations which the latter was able to formulate. Persisting problems with regard to "newly independent States formed from two or more territories" are no fewer; on this assumption, articles 16 to 29 (and hence article 20) undoubtedly apply in principle pursuant to article 30, paragraph 1; but, what if the new State fails to denounce any incompatible reservations at the time when the succession is notified? The same problem occurs in the case of the uniting of States, in respect of which the Convention contains no applicable provisions concerning reservations.

Secondly, while article 20, paragraph 1, provides for the possible formulation of new reservations by the new State, and while the effect of paragraph 3 is that third States may formulate objections in that event, it fails to stipulate whether the latter can object to a reservation being maintained. Nonetheless, this may seem logical if it is recognized that, in maintaining a former reservation, the new State is exercising an inherent right and is not acting as if it has the rights of the predecessor State.[152]

Lastly, and this constitutes a serious lacuna, article 20 makes no reference whatsoever to succession concerning objections to reservations, while the initial proposals of Sir Humphrey Waldock dealt with this point without the reasons for this ommission being clear.[153]

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[152] See Marco G. Marcoff, Accession à l'indépendance et succession d'Etats aux traités multilatéraux (Fribourg, Editions universitaires, 1969), pp. 345-346.

[153] See Imbert, op. cit., pp. 318-322.

3. Conclusions

(section 18)

The discussions of the Sixth Committee during the Forty-sixth and Forty-seventh sessions of the General Assembly bring to light the criteria which, in the view of Member States, should guide the Commission in drawing up its future work programme. Four criteria can be elicited, namely, the subject or subjects to be considered should:

- meet a need of the international community;
- have reasonable chances of being successfully completed;
- within a specific period of a few years;
- fall within the competence of the International Law Commission and its members.[154]

(a)

It would clearly be presumptuous for the Commission to affirm that the subject discussed in this submission meets a need of the international community without first obtaining the opinion of the Sixth Committee, particularly since it is a matter of irrelevance that the initiative to suggest it was taken, not by the Commission, but by representatives of State Members of the Sixth Committee (see section 1 above). However, cataloguing the ambiguities and omissions of the existing codification texts (see 2. (b) and (c) above) scarcely leaves any doubt as to the fact that the rules hitherto formulated are incomplete. Moreover, their adoption has given rise to new problems (see 2. (a) above).

Undoubtedly, as doctrine has underlined,[155] States have not abused their largely recognized right to make reservations, and the fairly numerous incidents arising in that connection have therefore only rarely degenerated into real disputes. It nonetheless remains that great uncertainty continues to surround the legal regime governing reservations, and there is reason to believe that difficulties may arise increasingly in the near future (particularly concerning the rules applicable in the case of succession of States, which are particularly incomplete -- see section 17 above).

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[154] See Topical summary of the discussion held in the Sixth Committee of the General Assembly during its Forty-sixth session prepared by the Secretariat, on the consideration of the Commission's report on the work of its forty-third session (A/CN.4/L.469, paras, 398-402) and of its forty-fourth session (A/CN.4/446, paras. 302-303).

[155] See specifically, Colella, loc. cit., p. 475 and Imbert, op. cit., pp. 324-339.

(b)

It would seem that a codification exercise of any kind (see section 21 below) would have a more than reasonable chance of being successfully concluded.

Certainly, technical as a subject may seem, it is never politically neutral; and, there is no denying that the rules of partial codification so far adopted in these areas have been inspired by eminently political considerations.

Although the international political context has undergone quite profound changes since the 1960s, it is still probably neither useful nor desirable to call the principles laid down at that time into question (see section 19 below). However, it is reasonable to think that in the new international climate it will be possible to make them more meaningful and precise, in a calmer setting which is more conducive to work on codification and progressive development.

(c)

For the same reasons, such work must be completed within a specific period of time.

It does not seem unrealistic to think that the Commission would be in a position to adopt an initial set of draft articles, or a first draft to serve as a "guide" (see section 21 below), within three or four years of the subject being included on its agenda and the appointment of a Special Rapporteur:

- During the first year, the Commission could prepare a preliminary report, listing outstanding problems more comprehensively than this submission and setting forth its general views on the question. At the same time, the Secretariat could be given the task of updating the information contained in the Commission's 1965 report.[156]

- The second and third years could be devoted to the presentation by the Special Rapporteur of one or two draft texts on codification and progressive development and to their discussion by the Commission.

- If the Commission decided to refer them to the Drafting Committee, the latter could possibly review them as from the end of its session corresponding to the second year, and in any case during the third year, although it may mean that no final text is proposed until during the fourth year.

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[156] Yearbook of the International Law Commission 1965, vol. II, pp. 74-107.

- The Commission could discuss and adopt the draft on first reading during the fourth year and transmit it to the General Assembly.

(d)

Lastly, there seems little doubt that the subject in question falls squarely within the competence of the Commission and its members.

Codification of treaty law is probably the area of the Commission's work in which the most progress has been made. Initial lacunae (treaties of international organizations, the most-favoured-nation clause and succession of States in respect of treaties) have largely been or are being filled in as a result of codification of the rules applying to State responsibility (see article 73 of the Convention of 1969 and article 39 of the Convention of 1978). By undertaking to complete the codification and progressive development of rules applying to reservations, the Commission would be completing a task of which it has acquitted itself well. (However, the question of the effects of the outbreak of hostilities between States (ibid.) would remain to be addressed.)

(section 19)

Codified rules on the subject of reservations, although fragmented and incomplete, nevertheless exist. If the Commission decides to consider the issue of reservations in depth, as would appear to be desirable, it must take account of this situation, which is not entirely new. Whether what is at issue is the succession of States in respect of matters other than treaties, international liability for injurious consequences arising out of acts not prohibited by international law, or treaties concluded between States and international organizations, the Commission has not opened up new ground with respect to codification.

However, the situation we are dealing with is somewhat exceptional because there are already some provisions on the very subject-matter that is to be codified.

To the extent that the Commission's intention is first of all to eliminate lacunae, no substantive problems arise: it is a matter merely of adding to existing texts, not of modifying them. However, it is necessary to consider what form those additions should take: additional protocols to previously adopted conventions, or a consolidated text that incorporates relevant existing provisions and adds new rules.

Ambiguities in previously codified rules are numerous and represent a serious problem in some cases (see 2. (b) above). They present more of a challenge than lacunae because it could prove difficult to clarify the provisions in question without changing their wording. Nevertheless, the suggested approach for eliminating lacunae could be taken to ambiguities.

The above also applies if the intention is to modify existing provisions. However, a decision cannot be made to modify an existing provision purely on technical grounds. It is true that when the rules adopted in 1969, 1973 and 1986 were implemented some defects came to light, and it would probably be rash to maintain that they have all been so strengthened as to become indisputable rules of customary law (see 2. (a) above). In another respect, however, their adoption does provide a balance between partially conflicting (political) positions. While one could argue that the world has changed since 1969 and therefore the problem of reservations is less of a "burning issue" than it once was, calling this compromise into question needlessly could stir up old quarrels. The author of the present submission would be very reluctant to adopt a strategy he regards as especially "gratuitous," since -- whatever their (minor) defects -- where they exist, the relevant codified rules are generally satisfactory and provide the necessary flexibility, thus meeting a goal that all States support, as far as can be judged.

Without prejudice to the response from the members of the Sixth Committee, it would seem desirable for the Commission, should it decide to include the question of reservations in its programme of work, to limit itself to the task of eliminating lacunae and removing ambiguities in existing rules without modifying the rules, or at least without calling into question the principles upon which they are based.

(section 20)

The Working Group and the Planning Group have selected "The law and practice relating to reservations to treaties" as the title for the topic to be considered (see section 1 above). This title seems rather academic, and it prejudges the outcome of the Commission's work on this topic. Of necessity, the outcome will be either a "study" or a "report" because, while "the law" lends itself to codification, this is not so in the case of "practice," which might reveal customary rules or lead to the progressive development of the law, but which is not itself subject to codification.

For other reasons, the proposal made in the Sixth Committee to study "The legal effects to be given to reservations and objections to reservations to multilateral conventions" (ibid.) is not entirely satisfactory. While the effects of reservations and objections remain one of the great unknown quantities in the reservations regime (see sections 11 and 12 above), there are other lacunae and ambiguities in this area, and it would be unfortunate not to take this opportunity to attempt to correct that situation.

In addition, the word "conventions" is not in keeping with the Commission's usage; and, there is a question, though secondary, as to whether reservations to bilateral treaties are to be contemplated or not (see section 10 above).

Therefore, it seems sensible to choose as neutral and comprehensive a title as possible, at least provisionally, and then adjust it later on if it appears advisable to limit the scope of the study. A possible title would be: "Reservations to treaties."

(section 21)

As indicated above (section 19), this process could lead to the adoption either of draft protocols to existing conventions, or of consolidated draft articles, combining various provisions from the Conventions and of the new codified rules, intended to complete and clarify the provisions; it would then be for the General Assembly to decide what should become of the draft. There is a rather strong argument in favour of one or the other of these solutions: treaty rules do in fact exist, and it might seem valid to continue along the same lines and consolidate the treaty reservations regime.

However, whether one sees this exercise as codification or as the progressive development of international law -- in fact, both codification and progressive development are involved -- there is no provision in the Statute[137] of the Commission placing it under the obligation to present the results of its work in the form of draft articles. They may also be presented in the form of a detailed study or even as a commentary on existing provisions and could be a sort of "guide to the practice of States and international organizations" which would have the authority of a document formally adopted by the Commission. This method, which would prevent "zigzagging" between existing provisions and make it possible to overcome smoothly the problems mentioned above (section 19), would also present clear advantages.

Whatever the case may be, and contrary to what is sometimes required, it does not appear absolutely necessary to reach a final decision on this point at the current stage; it would be satisfactory if the Commission were to reach a decision on the basis of a more complete presentation of the issues which could be the subject of an initial report by the Special Rapporteur (see section 18 (c) above) and a topic for discussion in the Sixth Committee.

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[137] On this point as on many others, the Statute is fairly obscure and contradictory.

(section 22)

To recapitulate, I believe that:

(a) The topic "Reservations to treaties" is particularly appropriate for a study by the Commission and fully meets the criteria which emerged during the discussions in the Sixth Commmittee with a view to identifying a topic for inclusion in the Commission's future programme of work.

(b) There is no need at this stage to decide what form such a study should take -- draft protocols to existing conventions, a consolidated draft convention, or an analytical reference guide to law and practice relating to reservations for use by States and international organizations.

(c) Whatever form is chosen, the codified rules in the 1969, 1978 and 1986 Conventions should not be called into question or modified, but consolidated and made more specific.

I therefore believe that a study, still very basic, of the question of reservations would fully embody the initial idea of the Working Group, which in its report to the Planning Group concluded that this topic "could be appropriate for a speedy incorporation into the Commission's agenda." However, I reserve my position on the Working Group's second proposal -- that this topic might "form the subject of an instrument of codification" -- if it is to be construed as referring to a set of draft articles designed from the outset to lead to another convention.

EXTRATERRITORIAL APPLICATION OF NATIONAL LEGISLATION OUTLINE BY MR. PEMMARAJU SREENIVASA RAO

(section 1)

National legislation is sought to be given extraterritorial jurisdiction in different contexts. For example:

- to exercise jurisdiction over nationals wherever they are;[156]

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[156] Civil law countries exercise jurisdiction over their nationals for offences committed even while they were abroad. Public Prosecutor v. Antoni (Swedish Supreme Court (1960)), International Law Reports, vol 32 (1966), p. 140. For a mention of the statutory provisions of some countries like France and Germany, see Louis Henkin, Richard C. Pugh, Oscar Schachter and Hans Smit, International Law: Cases and Materials (St. Paul, Minnesota, West Publishing Co. 1980), p. 445.

Among the Common Law countries: section 4 of the Indian Penal

- to protect a State against treason, terrorism, drug trafficking and other offences affecting its power and security;[159]

- to protect and regulate activities affecting its wealth, resources and other economic interests;[160]

- to secure rights of human persons.[161]

Code. See *Pheroze Jehangir v. Roshanlal*, 66 *Bombay Law Reports* 225 (1964); *Central Bank of India Ltd. v. Ram Narain*, AIR 1955 SC 36; U.K. law also allows such jurisdiction in select cases: treason, homicide, bigamy, perjury, breaches under Official Secrets Act, etc.

U.S. exercises extraterritorial jurisdiction in a wide variety of cases: treason, tax, unauthorized attempts to influence a foreign government, violation of U.S. laws on restrictive trade practices, failure to answer subpoenas issued to attend a court as a witness (*Blackmer v. United States*, 52 S. Ct. 252 (1932)); for offences committed outside territorial sea on the high seas (*Skiriotes v. Florida*, 61 S. Ct. 1093 (1941); *U.S. v. Bowman*, 23 U.S. 66 (1922); and *Steele v. Bulova Watch Co.*, 343 U.S. 962 (1952), and other cases), see Henkin, Pugh, Schachter and Smit, op. cit., pp. 445-447. See also Georges René Delaume, "Jurisdiction over Crimes Committed Abroad: French and American Law" *George Washington Law Review*, vol. 21 (1952), p. 173.

[159] For a brief discussion of this aspect, see Geoff Gilbert, *Aspects of Extradition Law* (Dordrecht, The Netherlands, Martinus Nijhoff, 1991), pp. 43-45. See also *Joyce v. Director, Public Prosecutions*, (1946) A.C. 347. Also see Lotika Sarkar, "The Proper Law of Crime in International Law," *The International and Comparative Law Quarterly*, vol. 11 (1962), p. 446.

[160] See D. W. Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources," *British Year Book of International Law*, vol. LIII (1982), p. 1.

[161] The passive personality principle allowed "State to assume jurisdiction for offences committed against its nationals." *The S.S. "Lotus"* case: decision of 7 September 1927 *Permanent Court of International Justice*, Series A, Judgment No. 9 (Turkey assumed jurisdiction over French Captain); *The Cutting* case (1886) (Mexico assumed jurisdiction over U.S. national). Both France and U.S. have their own versions of law and practice assuming similar jurisdiction now. Article 689, sec. 1, Code de procédure pénale (1975). For U.S. practice, see for discussion of the case of Fawaz Yunis, a Lebanese national, in Andreas F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law," *American Journal of International Law*, vol. 83, No. 4 (1989), p. 880.

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(section 2)

Exercise of extraterritorial jurisdiction is considered to be inevitable and even desirable because of:

- interdependence of the international community which necessitates extension of State's legislative jurisdiction beyond its borders to regulate transnational activities which have a profound effect on or of concern to the State;[162]

- the desirability to avoid safe havens for criminals;[163]

- the need to regulate and control activities of entities with agencies spread in different parts of the world, but connected or linked to a common source or headquarters or objectives criss-crossing several jurisdictions with no single jurisdiction being effective to control the enterprise;[164]

- the imperatives of international cooperation to give full effect to bilateral or multilateral obligations.[165]

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[162] Even in 1935, Harvard research in international law, "Jurisdiction with Respect to Crime," American Journal of International Law, Supplement to vol. 29 (1935), p. 435, recognized that with the increasing facility of communication and transportation, the opportunities for committing crimes whose constituent elements take place in more than one State have grown apace; and to meet these conditions, it suggested that the territorial principle was expanded to include the subjective and objective territorial principles of jurisdiction.

[163] See the recent case of the U.K. Privy Council in Liangsiriprasert v. United States, (1991) A.C. 225.

[164] Literature on the problems posed by the multinational corporations or enterprises is vast. See Transnational Corporations: A Select Bibliography, UN Dag Hammarskjöld Library, Bibliographical Series, No. 17 (ST/LIB/SER.B); and the 1976 OECD Declaration, International Investment and Multinational Enterprise (Paris, OECD, 1984). For draft guidelines on transnational corporations, see Report of the UN Commission on Transnational Corporations, International Legal Materials, vol. 22 (1983), p. 192. See Cynthia Day Wallace, Legal Control of the Multinational Enterprise (The Hague, Martinus Nijhoff, 1982).

For a discussion of the various legal issues of relevance to extraterritoriality involving the parent corporation and its subsidiaries, see F.A. Mann, "The Doctrine of International Jurisdiction Revisited after Twenty Years," Recueil des cours de l'Académie de droit international de La Haye, vol. 186 (1984-III), pp. 56-66.

(section 3)

Claims and counter-claims as to the acceptability or reasonableness of exercise of extraterritorial jurisdiction are centred around:

- the nature of jurisdiction: civil or criminal;[166]
- the type of jurisdiction: legislative, adjudicatory of

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[165] Assumption of extraterritorial jurisdiction is an essential feature of modern day bilateral, multilateral conventions on Extradition, Prevention of Hijacking, Civil Aviation Offences and Protection of Diplomatic Persons. A State also is required to assume extraterritorial jurisdiction in pursuance of its obligation towards international community as a whole, obligations known as the obligations erga omnes. The exercise of such jurisdiction is valid and accepted according to the International Court of Justice in respect of offences concerning outlawing acts of aggression, genocide, principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination. The Court also held that some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of universal or quasi-universal character. See The Barcelona Traction, Light and Power Company, Limited, previously cited, I.C.J. Reports 1970, p. 32.

[166] Brownlie does not believe that there exists any real distinction between civil and criminal jurisdiction in this regard: Ian Brownlie, Principles of Public International Law, 4th ed. (Oxford, Clarendon Press, 1990), chap. XIV, p. 299. However, see R. Y. Jennings "Extraterritorial Jurisdiction and the United States Antitrust Laws" British Year Book of International Law, vol. XXXIII (1957) p. 146, where the author distinguishes the elementary cases of direct physical injury, such as homicide, from other cases where only an element of alleged remote consequential damage was involved (as for example in the antitrust cases) and argued that while, in the former case, extraterritorial exercise of criminal jurisdiction is permissible, in the latter case to apply the formula of "effects" would be, according to him, "to enter upon a slippery slope," virtually endorsing unlimited extraterritorial jurisdiction of a State. See also the Report of the Fifty-first Conference (1964) of the International Law Association on "Extraterritorial Application of Restrictive Trade Legislation" -- Jurisdiction and International Law.

enforcement.[167]

(section 4)

The issues or claims or counter-claims have arisen invoking:[168]

- principles concerning jurisdiction;
- sovereignty and non-interference;
- genuine or substantial link between the State and the activity regulated;
- public policy, national interest;
- lack of agreed prohibitions restricting States right to extend its jurisdiction;
- reciprocity; retailation;
- promotion of respect for law.

(section 5)

On the policy level, several issues arise:

- How far and within what limits a State should exercise its

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[167] Many writers discuss problems on extraterritoriality treating the three different types of jurisdiction separately. See Mann, loc. cit. Brownlie does not agree with this distinction also -- see Brownlie, ibid., p. 310.

[168] Alexander M. Stuyt, The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction (S-Gravenhage, Martinus Nijhoff, 1946); F. A. Mann, "The Doctrine of Jurisdiction in International Law," Recueil des cours de l'Académie de droit international de La Haye, vol. 111 (1964-I), p. 1; Michael Akehurst, "Jurisdiction in International Law," British Year Book of International Law, vol. XLVI (1972-73), p. 145; Andreas F. Lowenfeld, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction," Recueil des cours ..., vol. 163 (1979-II), p. 311; Myres S. McDougal, "Jurisdiction," U.S. Naval War College International Law Studies, vol. 62 (1980), p. 634; A. V. Lowe, "The Problems of Extraterritorial Jurisdiction; Economic Sovereignty and the Search for a Solution," The International and Comparative Law Quarterly, vol. 34 (Part 4), (1985), p. 724 and Douglas E. Rosenthal, "Jurisdictional Conflicts between Sovereign Nations," International Lawyer, vol. 19 (1985), p. 487.

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jurisdiction over a foreigner for conduct outside its territory when the foreigner is subject to the jurisdiction of the State of nationality or some other State in respect of the same conduct.[169]

- Should a State have the same authority and control over activities of a foreigner in areas over the sea beyond its coastal zone -- the territorial sea, contiguous zone, economic zone, continental shelf and high seas -- as it has within its territory?[170]

- Should the nature of jurisdiction a State exercises over maritime areas be strictly limited to the type of authority it enjoys over such areas or zones under international law or could its jurisdictional exercise be regarded as reasonable and hence permissible, in the absence of any outweighing competing claim?[171]

- Could a State exercise its authority and power over rivers, canals and other resources within its territorial jurisdiction on the basis of sovereignty it enjoys over them without regard for the adverse effects for other States, particularly in the case of rivers and canals flowing through more than one State.[172]

- Conversely, could a State so affected or likely to be affected prescribe through its national legislation certain standards of behaviour for other States and their nationals and seek to enforce the same through its judicial and executive organs?[173]

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[169] For a discussion of issues in this regard, see P. M. Roth, "Reasonable Extraterritoriality: Correcting the 'Balance of Interest'," The International and Comparative Law Quarterly, vol. 41 (Part 2), (1992), p. 245.

[170] See sections 141, 287-298, 202-203 and 205. Lassa F. L. Oppenheim, International Law, (Jennings & Watts, eds.) vol. I (1911). See, for a discussion of policy issues concerning jurisdiction over the maritime areas, Myres S. McDougal and William T. Burke, The Public Order of the Oceans (New Haven, Conn., New Haven Press, 1986). P. Sreenivasa Rao, Public Order of the Ocean Resources (1975).

[171] See, for example, N. March Hunning, "Pirate Broadcasting in European Waters," The International and Comparative Law Quarterly, vol. 14 (1965), p. 410; and P. Sreenivasa Rao, "The Seabed Arms Control Treaty: A Study in the Contemporary Law of the Military Uses of the Seas," Journal of Maritime Law and Commerce, vol. 4, No. 1 (1972), p. 67.

[172] See the work of the International Law Commission on regulation of law concerning non-navigable uses of international watercourses.

- What should be the limits for exercise of jurisdiction on the basis of the principles of "effects," "passive personality," or "active personality"?[174]

- What factors should govern to resolve conflicts in jurisdiction, for example: when conduct prescribed by one State is prohibited by another?[175]

- Can uniform policies be prescribed to control extraterritorial effects of national legislation?[176]

- What should be the proper role of international law in dealing with conflicts in jurisdiction involving essentially the private or personal rights of individuals as opposed to public interests of a State? In other words, what is the proper relationship between principles of public and private international law on the one hand and international and municipal (or national) law on the other?[177]

- Can "self-help" by a State, or its officials, or its agents, be justified in enforcing national law and policies in the fact of opposition, lack of cooperation, or lack of an expeditious response from foreign States, or to overcome inevitable or inherent delays in processing requests through diplomatic, administrative and judicial organs of such States?[178]

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[173] See James L. Brierly, The Law of Nations, 6th ed., C. H. Waldock, ed. (Oxford, Clarendon Press, 1963).

[174] Encyclopedia of Public International Law, vol. 10 (1987), pp. 158-161.

[175] For an interesting exchange of views between Judge Wilkey, who decided the case Laker Airways Limited v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984), and Professors Lowenfeld and Henkins, all connected with drafting section 403 of the American Law Institute Restatement providing for balancing of national interests and reasonableness as a test for assuming jurisdiction by U.S. courts when another State also has jurisdiction over the subject matter resulting in concurrent and/or conflicting jurisdiction, see Harold G. Maier, "Resolving Extraterritorial Conflicts or 'There and Back Again'" Virginia Journal of International Law, vol. 25, No. 1 (1984), p. 7.

[176] Mann, Recueil des cours ..., vol. 186, pp. 26-31.

[177] See Oscar Schachter, International Law in Theory and Practice (Dordrecht, The Netherlands, 1991), pp. 256-257; Brownlie, op. cit., pp. 306-307. Mann, Recueil des cours ..., vol. 111, pp. 17-22 and Recueil des cours ..., vol. 186, pp. 31-32. Harold G. Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law," American Journal of International Law, vol. 76 (1982), p. 280.

- What kind of remedies are or should be available in case of abuse of exercise of jurisdiction by a State?[179]

(section 6)

These issues or policy considerations are the subject matter of national legislations of several States -- USA, European States, criminal laws of States and the European Economic Community; some multilateral conventions, Declarations of the United Nations; case law of the international courts and national tribunals.[180]

The doctrine concerning extraterritorial application of national legislation is not well settled. There are no uniform or universally settled principles in this regard. Interpretation and application of the same is essentially left to the courts in individual cases and they vary depending upon the field or issue at hand.

The basic principle, however, is that all national legislations are, prima facie, territorial in character.[181] While the Permanent Court in the Lotus case recognized this principle, it also held that several States did approve extraterritorial effect being given to their national laws, and that such a policy and practice were not prohibited by international law.[182] This view of the Permanent Court appears to have provided the basis for Justice Learned Hand in the Alcoa case wherein the Court held valid extension of the U.S. Sherman Act over activities by foreigners outside the U.S., but having effects or consequences within the

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[178] See the U. S. Congressional discussion on this point, in Andreas F. Lowenfeld, "U.S. Law Enforcement Abroad: The Constitution and International Law, Continued," American Journal of International Law, vol. 84, No. 2 (1990), pp. 484-488.

[179] See the work of the International Law Commission on State Responsibility.

[180] For a collection of legal materials in this regard, see Alan V. Lowe, Extraterritorial Jurisdiction (Cambridge, Grotius Publishers, 1983).

[181] American Banana Company v. United Fruit Company, 213 U.S. 347 (1909).

[182] Page 25 -- see footnote 161 above.

United States.[183]

The test of effect also provided the basis for the United States and other countries to extend the reach of their laws over activities affecting their interests (including the interests of their nationals). This position is supported on the basis of the principle of the objective territoriality which is viewed as an extension of the territoriality principle.

Even though the application of the principle of objective territoriality is seen as generally acceptable,[184] particularly in the case where physical injury is involved,[185] there is disagreement as to the conditions under which the application of the test of effects could be held as reasonable. Indeed, in several fields -- bankruptcy,[186] antitrust,[187] shipping,[188] taxation,[189] nationality,[190] discovery,[191]

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[183] See United States of America v. Aluminium Company of America (148 F.2d 416 (1945), where Justice Learned Hand observed that: "it is settled law ... that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends."

See also Continental Ore Company v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962) and United States v. The Watchmakers of Switzerland Information Centre Inc., 133 F.Supp. 40 (S.D.N.Y. 1955).

[184] See Mahomed K. Nawaz, "Criminal Jurisdiction and International Law," The Indian Year Book of International Affairs, vol. I (1952), p. 210, where the author discussed extraterritorial application of the Indian Penal Code of 1860 which largely remains the law even today, and analyzes the other principles, including the objective territoriality principle with reference to Indian cases (Emperor v. Chotalal and Wheeler v. Emperor). See also Mobarik Ali Ahmed v. State of Bombay, AIR 1957 SC 857; R. v. Baxtor, 2 All ER 359 (1971); and Secretary of State for Trade vs. Markus, 1 All ER 958 (1975). See also C. Blakesley, "United States Jurisdiction Over Extraterritorial Crime," Journal of Criminal Law and Criminology, vol. 73 (1982), p. 1109 and K. Dam, "Extraterritoriality, Conflicts of Jursidiction," American Society of International Law - Proceedings of the 77th Annual Meeting (1983), pp. 370-7.

[185] Jennings, loc. cit.

[186] The Barcelona Traction, Light and Power Company, Limited case -- see footnote 165 above.

[187] Karl M. Messen, "Antitrust Jurisdiction under Customary International Law," American Journal of International Law, vol. 78, No. 4 (1984), p. 783.

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[188] Mann, Recueil des cours ..., vol. 186, pp. 21-94; Mogul Steamship Co. v. McGregor Gow & Company, (1892) A. C. 25, dealing with U.K. law on shipping conferences. However, this position is not agreed to by the United States in certain cases resulting in 1981 in a number of shipping lines, including a German and English one being heavily fined. See British Year Book of International Law, vol. L (1979) p. 352 and ibid., vol. LII (1981) p. 459. Also see, in this connection, the note addressed by a group of 13 States to United States rejecting its right to impose its laws on events and activities taking place, wholly or largely, within the territories of other States, ibid., vol. XLIX (1978), p. 386. According to Mann, shipping conferences are a pre-eminent example of the working of "effect doctrine" (p. 92).

[189] See section 7 of the German Law; section 482 of the U.S. International Revenue Code; section 80 of the English Finance Act, 1984, which permit, subject to various conditions, the apportionment of subsidiaries' profits among its shareholders and the imposition of tax upon them. See also section 38 of U.K. Finance Act, 1973, in conjunction with section 12 of the Capital Gains Tax Act, 1979, under which gains of oil companies outside the U.K. are treated as gains carried on in the U.K. through a branch or agency. See also Friedrich K. Juenger, "Conflict of Laws: A Critique of Interest Analysis," American Journal of Comparative Law, vol. 32 (1984), p. 1.

[190] See The Antelope case, 23 U.S. 66 (1825), where Chief Justice Marshall held that a U.S. Court lacked jurisdiction over a foreign vessel accused of engaging in prohibiting slave trade, "however abhorrent this traffic may be," thus rejecting extraterritorial application of U.S. laws over a foreign ship, hence nationalities. However, see U.S. v. The La Juene Eugenie, 26 F. Cas. 832 (C.C.D. Mass. (1822)), where Justice Story held that slave trade violated the Law of Nations and, therefore, fell within the jurisdiction of an American Court. See also Foley Brothers Inc. v. Filardo, 336 U.S. 281 (1949), where the Court held that the eight-hour workday law did not apply to an American citizen working abroad on a contract between the U.S. Government and a private contractor. See for a discussion of these cases and other aspects, Note: "Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms," Harvard Law Review, vol. 103, No. 5 (1989-90, Part 2), pp. 1288-89.

[191] Roth, loc. cit., pp. 249-250. See also Australia: Foreign Proceedings (Prohibition of Certain Evidence) Act, 1976 - in Lowe, op. cit., p. 79.

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recognition of foreign acts[192] -- application of the text of effect or assertion of jurisdiction by a State on the basis of national interest provoked controversy. The United States, Germany and the European Economic Community, among others, support assumption of jurisdiction on the basis of the principle of effects in the antitrust field.[193] This was opposed by the United Kingdom and several other countries.[194] Japan opposed the United States attempts to extend its laws to regulate shipping conferences taking place essentially outside the United States.[195] The United Kingdom and several other countries have also passed blocking national legislations, denying recognition to United States law.[196] They also adopted the "clawback remedy" under which a certain class of defendants in the foreign proceedings are given the right to reclaim in the United Kingdom. courts that part of the foreign judgement awarding triple or multiple damages which exceeds the normal compensation.[197]

Given this set of conflicts, attempts were made to define reasonable exercise of extraterritorial jurisdiction by States. It was suggested that, for assertion of extraterritorial jurisdiction, the effect within the territory should be substantial and the direct and foreseeble result of activity abroad.[198] In another case, it was suggested that there should be a substantial and genuine or bona fide link for such jurisdiction to be reasonable.[199] Courts also attempted balancing of national interest as a guide to justify jurisdiction in this regard.[200] American Law Institute's Restatement indicated a set of factors to judge reasonableness of exercise of extraterritorial jurisdiction in case of counter-claims for jurisdiction on the basis of the principle of territoriality or nationality.[201] Several other factors like vital national interests, considerations of foreign policy or relations, international law or comity, limits of judicial power, reciprocity, hardship to the individual involved, control exercised by parent body over subsidiaries were also taken as relevant for judging reasonableness of the exercise of extraterritorial jurisdiction.[202]

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[192] Lassa F. L. Oppenheim, International Law, vol. I, p. 371. See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[193] Roth, loc. cit., pp. 245-249, 260-265.

[194] Brownlie, op. cit., pp. 311-314.

[195] See Lowe, op. cit., p. 121.

[196] Extraterritorial Application of Law and Responses thereto (1984). See also documents reproduced in Part II, Lowe, op. cit. and Bowett, loc. cit., pp. 22-24.

[197] Roth, loc. cit., p. 252. See also British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., 2 All Er 780 (1952), where a U.K. Court prevented ICI from parting with any of the patents which it had contracted to license to BNS as a retaliation to the decree issued by a U.S. court in United States v. ICI. In the Westinghouse Electric Corporation Uranium Contract Litigation, (2 December 1977), International Legal Materials, vol. 17 (1978), p. 38, the House of Lords refused compliance with letters rogatory issued out of a U.S. decree court on the ground that English courts should not cooperate in investigations based on the extraterritorial obligation of U.S. antitrust laws.

[198] Restatement of the Law (Second), (Washington, D. C., American Law Institute).

States have also entered into formal or informal agreements

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[199] Brownlie, op. cit., p. 310.

[200] For a critical analysis, see Kingman Brewster, Antitrust and American Business Abroad (New York, McGraw-Hill, 1958), (suggesting the concept of "jurisdictional rule of reason") and Bowett, loc. cit., pp. 18-22.

[201] Restatement of the Law (Third), (Washington, D. C., American Law Institute).

[202] Mannington Mills Inc. v. Congoleum Corporation, 595 F.2d. 1287 (3rd Cir. 1979). See Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976). However, in the Westinghouse Electric Corporation Uranium Contract Litigation (previously cited), International Legal Materials, p. 77, the U.S. court moved away from consideration of Comity the weighing of the interest of the foreign State and narrowing the enquiry to three factors: the complexity of the action, the seriousness of the charges and the recalcitrance of the foreign defendant. For the EEC strictures against the U.S. Government for breaching of international law and failure to apply the balancing of interest test in connection with the supply of materials for the Soviet pipeline, see International Legal Materials, vol. 21 (1982), p. 891.

Under the U.S. practice, in addition to the right given to foreign States to intervene in cases involving conflict of national iterest through the amicus curie briefs, they have also the right to sue under the U.S. antiturst laws. See Pfizer Inc. v. Government of India, in International Legal Materials, vol. 17 (1978), p. 93.

See also section 418 (2) of the Restatement of the Foreign Relations Law (revised), establishing U.S. jurisdiction over corporations organized under the laws of the foreign State that are substantially owned and controlled by nationals of U.S. See Mann, Recueil des cours ..., vol. 186, chap. III.

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to coordinate their policies, promote their cooperation and institutionalize responses governing exercise of extraterritorial jurisdiction. But most of these efforts had limited focus and others remained largely persuasive.[203]

Courts expressed their inability in some cases to deal with, evaluate and reconcile conflicting national interests.[204] States warned that such matters could not be left to domestic forums which, in the final analysis, could only be guided by their national laws and interests.[205] In view of this, it was felt that there is a strong case to codify and develop international law concerning the exercise of the extraterritorial jurisdiction by a State.[206]

Urgency concerning the matter of extraterritorial jurisdiction is highlighted by certain recent events involving abduction of persons from foreign jurisdiction to put them on trial before U.S. courts for offences connected with terrorism and drug-trafficking.[207] Such forcible and illegal abductions were condemned by several States as violation of their sovereignty and national laws and human rights. A proposal is now made by several countries requesting the United Nations General Assembly to consider submission of the legal cases involved for an advisory opinion of the International Court of Justice.[208]

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[203] See generally Mann, Recueil des cours ..., vol. 186 and Lowe, op. cit. Mention may also be made of various international conventions or treaties relating to terrorism and extradition, drug-trafficking and avoidance of double taxation.

[204] Laker Airways Limited v. Sabena, Belgian World Airlines -- see footnote 175 above. See also Argentine Republic v. Amerada Hess Shipping Corp., 109 S. Ct. 683 (1989): Shipping corporation faced with Congressional silence regarding extraterritorial application of laws. Courts invoke the presumption against extraterritoriality. See Note in Harvard Law ..., vol. 103, p. 1280.

[205] For views of the United Kingdom, see Note of 23 June 1982, British Year Book of International Law, vol. LIII (1982), p. 430. See also Satya v. Teja Singh AIR 1975 SC 105, where the Supreme Court of India said that every case which comes before an Indian Court must be decided in accordance with Indian law. Any recognition given to a foreign law because of certain foreign elements being present in the case is conditional according to the court on its conformity with Indian public policy. Referring to the U.S. State Department's position urging judicial restraint by the U.S. courts in the assertion of extraterritorial jurisdiction (see U.S. Guidelines for International Operations in the American Society of International Law - Proccedings of the 71st Annual Meeting (1977), pp. 214-224). Bowett argues that such an approach would not yield satisfactory results and will not be sufficient. See, for the various reasons given, Bowett, loc. cit., pp. 21-22.

[206] See Mann, Recueil des cours ..., vol. 186 and Roth, loc. cit.

Issues concerning the extraterritorial jurisdiction have also acquired prominence and require a comprehensive and conceptual response given the activities of States in outer space and over celestial bodies, maritime zones, Antarctica; and, their concern to control terrorism, drug-trafficking, transnational movement of persons and operation of multinational enterprises and demands for development involving claims for transfer or sale of technology without restricting the rights of the recipient States to trade freely in products or services, thus acquired with third parties;[209] and the need for States to seek security, independence and enjoy their sovereignty. Problems concerning extraterritorial jurisdiction may also have to be considered in the context of the global interdependence, transnational and environmental injuries, management of international rivers, preservation of the environment and biodiversity, checking population growth and eradication of poverty. The various principles of jurisdiction -- the principle of universality, the principles of active and passive nationality and the principle of effect -- have elements of extraterritorial application of national laws. These need to be analyzed and consolidated together as an exception to the basic principle of jurisdiction, the principle of territoriality.

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[207] See, for Documents and Judicial Resolutions on the Alvarez Machain case involving USA and Mexico, Limits to National Jurisdiction (1992); on illegality of abductions, see Lowenfeld, American Journal of ..., vol. 84.

[208] See, for the request by a letter dated 13 November 1992 from representatives of several Latin American countries, Portugal and Spain addressed to the Secretary-General of the United Nations, in documents A/47/249, Add. 1 and Corr. 1.

[209] See the problems created in connection with U.S. embargo on sending of goods or technology to the Soviet Union to be used in building a natural gas pipeline between USSR and Europe. H. E. Moyer and L. A. Mabry, "Export Controls as Instruments of Foreign Policy" Law and Policy in International Business, vol. 15 (1983), p. 1. See also Mann, Recueil des cours ..., vol. 186, pp 60-63.

There is no consistency in the U.S. position, even on embargoes and boycotts. See USA v. Betchel Corporation (Northern California District Court Judgment of 10 January 1977), restraining parties from applying the Arab Boycott against Israel within the USA. Contrast this with the U.S. enforcement of trade embargoes against China, Cuba and the Soviet block asserting extraterritorial reach for its Foreign Assets Control Regulations and its Export Control Act of 1949. See P. H. Silverstone, "Export Control Act of 1949: Extraterritorial Enforcement," University of Pennsylvania Law Review, vol. 107 (1959), p. 331 and "International Boycotts and Embargoes," American Society of International Law - Proccedings of the 71st Annual Meeting (1977), pp. 170-82.

On the inequity of universalizing the sanctions contained in the U.S. Super 301 Law and the system of cross-retaliation being proposed in the context of the Uruguay Round of negotiations, see B. S. Chimni, "Political Economy of the Uruguay Round of Negotiations: A Perspective," International Studies, vol. 29, No. 2 (1992) pp. 156-158.

In view of the above, it appears quite clear that a study of the subject of the extraterritorial application of national laws by the International Law Commission would be important and timely. There is an ample body of State practice, case law, national statutes and international treaties and a variety of critical scholarly studies and suggestions. Such a study could be free of any ideological overtones and may be welcomed by States of all persuasions. To commence with, the Commission need not commit itself for the development of a Convention on the subject. Even a model law or a compilation of guiding principles could contribute towards codification and progressive development of law in this important area of international law. Such a study further could complement the efforts of the Commission in the codification and progressive development of law in other areas like responsibility of States, liability for transnational injury, draft code of crimes and establishment of an international criminal jurisdiction.

Finally, a study on the subject of extraterritorial jurisdiction could provide an opportunity to examine the relationship and the limits between public and private international law on the one hand and international law and municipal law on the other.[210]

THE LAW OF (CONFINED) INTERNATIONAL GROUNDWATERS
OUTLINE BY MR. ALBERTO SZEKELY

Of the earth's fixed and invariable volume of water, which amounts to about 1.4 billion cubic kilometers, approximately 97.3% is ocean salt water. Only the remaining 2.7% is fresh water. Of all fresh water available on the planet, 77.2% is found in the polar ice caps and glaciers. The rest of the world's fresh water reserve is divided between groundwater (22.4%), lakes and rivers (0.36%) and water in the gaseous state, present mainly in the atmosphere (0.04%). Many of the underground aquifers of the world are located in a transboundary fashion.

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[210] See Sir Anthony Mason, "The Relationship Between International Law and National Law, and its Application in National Courts," Commonwealth Law Bulletin, vol. 18, No. 2 (1992), p. 750.

If nearly 47% of the world's land area (excluding Antarctica) falls within approximately 165 transboundary river and lake basins, the figure for transboundary underground acquifers is even higher, reaching nearly 60% in Africa and in Latin America.

Large transboundary aquifers in the different continents, such as the Northeastern African aquifer underlying Libya, Egypt, Chad and Sudan, the European Aquifer underlying the many territories of the riparian States of the Rhine, and those in the Arabian Peninsula across the boundaries of Saudi Arabia, Bahrain, Qatar, the United Arab Emirates and Jordan, amply show that groundwater, like surface water, often ignores political boundaries and lie in geological structures that straddle by themselves international borders or feed, or are fed by, international rivers and lakes.

Alarming demands on groundwater resources in the world are steadily increasing, not in small measure as a result of the exploding rates of population growth, industrial and agricultural development, and especially in border areas where, due to increased international trade and economic exchanges, proliferating human settlements and demographic concentrations are also on the rise.[211] In many locations, shortages or the quality of surface waters have caused users to expand the utilization of groundwater, the frequent result being the overpumping of aquifers, with the consequent deterioration of water quality, even the drying up of wells, thus creating all the necessary ingredients for potential conflict. As in the case of the Middle East, where almost all of the water in its river systems are already being used (including the Nile, Jordan and Tigris-Euphrates Rivers), in many other border areas of the world severe shortages will occur, combined with a deterioration of water quality, all of it leading to increased pressures on those rivers' interconnected aquifers, and on transfrontier aquifers not significantly related to surface supplies. Such a situation may only be exacerbated by the impact of global warming.

Even independently from all that has been said to this point, the exploitation of groundwater and the preservation of its quality have already become the single most pressing concern of border communities. This is particularly true in the vast arid regions of the world, where abuses or contamination of transboundary aquifers are reaching crisis proportions. Many transboundary deposits are being rapidly and uncontrollably depleted because withdrawals exceed recharge, and many are being rendered useless as a result of contamination. To all of the above concerns, add the often irreversible destruction and the threat of severe diminution of aquifer recharge from improper land use activities, or of long-lasting pollution from direct or indirect discharges into groundwaters of highly toxic wastes and substances, and the impact of droughts and floods, which traditionally lead to disasters affecting or caused by surface waters, an impact which is often mitigated by resort to vulnerable underground supplies, themselves threatened by inflitration of contaminated flood waters.

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[211] See World Population Prospects 1965-2000, as assessed in 1968 (ST/ESA/P/WP 37).

Water being the most critical and vital natural resource for human survival, potential or actual conflict over access to it or to secure the preservation of its quality cannot be conducive to harmonious international development or to the maintenance of international peace and security. Thus the need for an international legal regime in this matter.

Various important actors in the international community, both governmental and non-governmental, and most particularly within the United Nations system, increasingly aware of and concerned with the potential dangers to international peace and to the well-being of humankind, deriving from rising threats to the world's underground water supplies, have already pronounced themselves on the matter and sounded the voice of alarm. That has been the case with the 1965 InterAmerican Specialized Conference on Renewable Natural Resources, held in Mar del Plata, the 1977 Mar del Plata United Nations Water Conference,[212] the United Nations Interregional Meeting of International River Organizations, held in Dakar in 1981,[213] and the Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, organized by the United Nations Economic Commission for Africa and held in Addis Ababa in October of 1988,[214] which recommended that Governments recognize the interdependence and diversity of the components of the hydrologic cycle, including inter alia underground water and the water-atmosphere interface.

The International Conference on Water and the Environment, held in Dublin in January of 1992,[215] stressed the grave threats and potential for conflict stemming from the shortage and abuse of fresh water and, recognizing the great importance of these natural resource for the future of mankind, called for the negotiation of agreements and principles regarding the use, preservation and protection of transboundary groundwater basins.[216]

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[212] See Report in E/CONF.70/CBP/1.

[213] See "Experiences in the Development and Management of International River and Lake Basins," Natural Resources/Water Series No. 10, (ST/ESA/120).

[214] ST/TCD/13.

The Governing Council of the United Nations Environment Programme has also recognized the need for special attention to be given to activities relating to the management of these transboundary resources.[217]

The water chapter of the Agenda 21 adopted in Rio, in 1992, by the United Nations Conference on Environment and Development, contains an impressive emphasis and concern on the importance of groundwater, including transboundary aquifers, and calls on all countries to establish principles and institutional arrangements for their adequate use and protection.[218]

In international law, there are only general rules that apply, inter alia, but not specifically, to transboundary aquifers. That is why the 1977 United Nations Water Conference recommended that "[i]n the absence of bilateral or multilateral agreements, Member States continue to apply generally accepted principles of international law in the use, development and management of shared [sic] water resources."

As international law has evolved on matters regarding the use and conservation of national, international or transboundary natural resources in general, and even of water resources in particular, the respective principles and rules apply generally to transboundary aquifers simply because they constitute natural water resources divided by national boundaries.

Thus, specific multilateral international legal instruments may already contain some general references, provisions and even principles, as part of their rules, applicable to groundwaters (albeit not necessarily and specifically transboundary groundwaters), such as the 1967 European Water Charter adopted by the Council of Europe, or the 1968 Convention on the Conservation of Nature and Natural Resources, or the 1984 Declaration of Principles on the Rational Use of Water adopted by the Economic Commission for Europe (Decision C XXXIX), or some Directives of the European Economic Community Council, or the 1980 ECE Declaration of Policy on the Prevention and Control of Water Pollution. An EEC Committee approved in 1985 a set of principles more directly to the point, including seawater invasion of coastal aquifers, artificial recharge, heat storage in water tables, disposal of wastewater, pollution due to mining and farming and radioactive pollution.[219] The United Nations European Economic Commission adopted in 1987 Principles Regarding Cooperation in the Field of Transboundary Waters, expressing its awareness that prevention and control of transboundary pollution in groundwater aquifers, as well as the prevention of floods, are important and urgent tasks whose effective accomplishment can only by ensured by enhanced cooperation among the countries concerned.[220] The Principles delve in some detail into recommended terms of agreements, water quality objectives and criteria, institutional arrangements, functions of institutional bodies, pollution, monitoring and data processing, warning and alarm systems and other matters.

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[215] See Dublin statement on Water and Sustainable Development, (A/CONF.151/PC/112), as well as the seventh item in its Programme of Action.

[216] See sections 4.12 and 4.13, and section 7.6 of the Conference's Report.

[217] See, for instance, its decision 15/1.

[218] See, for instance, sections 18.24.d, 18.37 and 18.39 a -- Agenda 21: Programme of Action for Sustainable Development, Rio Declaration on Environment and Development, (ST/DPI/1344).

Obviously, the most advanced official legislative project which would apply more specifically to transboundary groundwaters, would be the International Law Commission draft rules on the Non-Navigational Uses of International Watercourses, which excludes a very important part or the world's transboundary aquifers, namely, those labeled by the previous Special Rapporteur as "unrelated/confined" groundwater, that is, those aquifers not directly connected, or not "constituting by virtue of their relationship a unitary whole" with an international surface watercourse "flowing into a common terminus."[221]

There are basically no precedents in international jurisprudence in this field, even when some more or less related cases may be found, apart from the even further removed ones such as the Lake Lanoux case,[222] as the 1927 Award of the Reich State Tribunal in a case involving transboundary groundwaters seeping from the Danube (Wurttemberg and Prussia v. Land in Baden).[223]

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[219] WATER/GE.1/R.66 and Annex.

[220] See 1987 Resolution 1 (42), in E/ECE/(42)/L.19.

[221] The quoted terms are taken directly from the Draft.

[222] International Law Reports, vol. 24 (1957), p. 101.

[223] See Entscheidungen des Reichsgerichts in Zivilsachen, 1927.

That does not mean that there is no international practice on the matter in the record. Much to the contrary, a vast array of bilateral agreements can be identified that in one way or another deal with transboundary groundwaters (and some times even with concrete aquifers).[224]

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[224] See, for example, the France-Spain boundary treaty of 1785; the Hanover-Netherlands frontiers treaty of 1824; the France-Switzerland process-verbal on frontier delimination of 1824; the Italy-Switzerland boundary treaty between Lombardy and the Canton Ticino of 1861; the Austria-Bavaria frontier line treaty of 1862; the Spain-Portugal boundary treaty of 1864; the France-Great Britain boundary agreement in Somaliland of 1888; the Austria-Switzerland treaty for the regulation of the Rhine of 1892; the France-United Kingdom exchange of notes relating to the Gold Coast-French Soudan boundary of 1904; the Persia-Turkeyt multipartite frontier delimitation protocol of 1913; the Belgium-Germany frontier dispositions of the Delimitation Commission of 1922; the Franco-British protocol establishing the limits between French Equatorial Africa and the Anglo-Egyptian Sudan of 1924; the Egypt-Italy agreement on the Ramla well of 1925; the Italy-United Kingdom exchange of notes respecting the River Gash of 1925; the France-Germany frontier delimitation treaty of 1925; the Persia-USSR frontiers water convention of 1926; the Belgium-Germany arrangement concerning the frontier of 1929; the Dominican Republic-Haiti treaty of peace of 1929; the Persia-Turkey frontier line agreement of 1932; the Belgium-United Kingdom agreement on boundary water rights (Tanganyika-Ruanda) of 1934; the Austria-Federal Republic of Germany agreement concerning water diversion of 1950; the Federal Republic of Germany-Luxembourg treaty concerning the construction of a hydroelectric power-plant on the Sauer of 1950; the Albania-Yugoslavia protocol regulating the use of the waters at their common frontier of 1953; the Jordan-Siria agreement concerning the Yarmuk of 1953; the Albania-Yugoslavia agreement concerning water economy questions of 1956; the France-Federal Republic of Germany convention for the development of the upper course of the Rhine of 1956; the Hungary-Yugoslavia agreement concerning water economy questions of 1955; the Italy-Yugoslavia agreement concerning water supply of the Commune Gorizia of 1957; the Greece-Yugoslavia process-verbal concerning hydro-economic studies of the Lake Dojran basin of 1957; the Federal Republic of Germany-Luxembourg treaty concerning hydro-electric power installations on the Our of 1958; the Bulgaria Yugoslavia agreement concerning water economy qustions of 1958; the Czechoslovakia-Poland agreement concerning frontier waters of 1958; the France-Switzerland convention on the protection of Lake Leman waters against pollution of 1962; the Poland-USSR agreement concerning frontier waters of 1964; the France-Federal Republic of Germany convention concerning development of the Rhine of 1970; the Finland-Sweden agreement concerning frontier rivers of 1972; the Minute 242 of the Mexico-United States International Boundary and Waters Commission of 1973; the Agreement between the

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The doctrine on the matter has basically inspired, aside from a respectable body of published specialized literature, two very advance academic efforts to codify and progressively develop the international law of transboundary groundwaters.

On the one hand, the 1986 International Law Association Seoul Rules on International Groundwaters (which followed the Association's 1966 Helsinki Rules on the Uses of the Waters of International Rivers), and the much more advanced and complete 1987 Bellagio Draft Treaty on Transboundary Groundwaters,[225] elaborated by a team of international water and environmental law experts in the International Transboundary Resources Center of the University of New Mexico Law School. The Draft evolved as a revision of a previous "Ixtapa Draft" published in 1985.[226]

The 1985 Ixtapa Draft and its revision in the 1987 Bellagio Draft, have already been thoroughly reviewed, widely quoted and increasingly invoked in the specialized literature and in several international bodies, events and reports, including in several sessions of the International Law Association, in a special Panel Session of the Sixth Congress of the International Water Resources Association held in Ottawa in May of 1988, in the Doman Colloqium on the Law of International Watercourses held at the University of Colorado School of Law at Boulder in October 1991, in the Tri-National Working Conference and the International Workshop on the North American Experience in Managing International River Systems, held respectively in Gasparilla Island in April of 1991 and also in Bellagio in December of 1992 and, most importantly, in the reports of the previous Special Rapporteur of the International Law Commission on the Law of the Non-Navigational Uses of International Watercourses.

The advantage of the degree of detail and precision of the Bellagio Draft, is that it would save considerable time and

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German Democratic Republic and Czechoslovakia of 1974; the France-Switzerland arrangement relating to the Franco-Swiss Genevese aquifer of 1977; the Canada-United States Great Lakes water quality agreement of 1978; the France-Switzerland convention for the protection, use and recharge of the Genevois water table of 1978; and the Agreement between Austria and Czechoslovakia concerning nuclear installations of 1982.

[225] Robert D. Hayton and Albert E. Utton, "Transboundary Groundwaters: The Bellagio Draft Treaty," Natural Resources Journal, vol. 29, No. 3 (1989), p. 663.

[226] Ann B. Rodgers and Albert E. Atton, "The Ixtapa Draft Agreement Relating to the Use of Transboundary Groundwaters," Natural Resources Journal, vol. 25, No. 3 (1985), p. 713.

research effort to the International Law Commission, and help it, in its way to a draft convention, to prepare its own Draft Rules taking advantage of it as a basic working document which enjoys already wide international prestige.

The greatest contribution which can be derived from the Bellagio Draft is that it already identifies the issues involved in the international law of transboundary groundwater resources, and proposes concrete and advanced provisions for each of the issues with authoritative support in the form of substantive comments. It includes a good number of important definitions, and proposed provisions for the general purposes of the draft articles, for the creation of an institutional mechanism, its enforcement and oversight responsibilities, for the establishment and maintenance of a database, for water quality protection, for the creation of transboundary groundwater conservation areas, for principles and criteria for the adoption of comprehensive management plans, for public health emergencies, for planned depletion of an aquifer, for transboundary transfers, for planning for drought, for inquiry in the public interest, for the regime of existing rights and obligations, for the accommodation of differences and for the resolution of disputes.

GLOBAL COMMONS
OUTLINE BY MR. CHRISTIAN TOMUSCHAT

One of the themes considered for inclusion in the Commission's programme of work is the "Global commons." The purpose of the present paper is to devote some reflections to the question whether that theme is suitable as subject of a study and possibly further work of codification and/or progressive development of law.

1. The concept of the global commons

The global commons has become a widely used formula in recent years. Notwithstanding its frequent appearance even in legal documents, its scope and meaning leaves much room for doubt. A binding legal definition does not exist. If our understanding is correct, two different categories of things are normally thought of when a person speaks of the global commons.

On the one hand, reference is made to areas or spaces not subject to national jurisdiction. In this sense, the global commons comprise the territories that do not belong to any State, in the first place, Antarctica, the high seas, as well as the spaces above and below the sea level beyond the areas of national jurisdiction, including the sea floor together with the subsoil thereof, and the celestial space with the moon, the other planets

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and the stars, to the extent that they are in any way subject to human domination.

On the other hand, the global commons can also be understood as encompassing additionally those environmental resources that resist total domination by man, namely air and water, as well as the global weather and climate as the result of the interaction of air, water and topographical conditions with the sun. In an even wider sense, the global commons would include the wealth of the earth's fauna and flora, irrespective of their territorial location.

It would appear obvious at first glance that it is not easy to lump together all these disparate elements. On the other hand, it is a matter of common knowledge that some of these elements at least are already regulated by international instruments. Thus, as a first step, it should be examined if and to what extent the different elements of the global commons are subject to specific rules under treaties in force or about to come into force. We shall leave aside, for the time being, the general rules of customary law which have evolved over the last decades, since customary law always presents a certain degree of fluidity. The existence of customary law should, therefore, not impede a possible effort at innovation by codification and progressive development.

2. Treaties applicable to the global commons

(a) Areas or spaces making up the global commons

(i) As far as the world's oceans are concerned, it is well known that their regime has been regulated in a comprehensive fashion by the 1982 United Nations Convention on the Law of the Sea.[227] Going much beyond the rather rudimentary rules that are contained in the 1958 Geneva Convention on the High Seas,[228] the 1982 Law of the Sea Convention devotes an entire chapter (Part XII, article 192-237) to the marine environment. Its basic proposition is enshrined in article 192, according to which "States have the obligation to protect and preserve the marine environment." The following provisions elaborate in greater detail on that rule. As far as "the Area" is concerned, i.e., the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (article 1 (1)), specific measures to be taken by the Authority are provided for (article 145). It would certainly be difficult to improve on this regime in a general instrument covering the global commons in their totality. In any event, any such attempt would mean amending the Law of the Sea Convention at a stage when it has not yet entered into force.

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[227] See footnote 19 above.

[228] United Nations, Treaty Series, vol. 450, No. 6465, p. 11.

The Law of the Sea Convention is not the only instrument governing activities related to the world's oceans. Many treaties have been concluded under the auspices of the International Maritime Organization. They cover such subjects as oil spills and dumping of waste, including nuclear waste. The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of 1963[229] prohibits all nuclear tests under water. Although there may exist some lacunae here and there, the main environmental threats are thus subject to legal regulation.

It also should be mentioned that there exist many regional treaties whose main objective is to prevent pollution of the seas from land-based sources.

(ii) Concerning Antarctica, 1991 saw the conclusion of a Protocol on Environmental Protection to the Antarctic Treaty.[230] It would make little sense to come up with proposals for the modification of the regime provided for in that Protocol.

(iii) Outer Space was subjected to legal regulation in 1967 through the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.[231] The Treaty does not directly deal with issues relating to the environment, although one may take the view that the prohibitions contained in article IV (1), which essentially aim at banning nuclear or other weapons of mass destruction, have at the same time beneficial effects for the global commons. The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979 goes one step further in providing in article 7 that "[i]n exploring and using the moon, States Parties shall take measures to prevent the disruption of the balance of its environment."[232] However, until now no practical problems have emerged which would require further protective steps.

(b) Environmental Resources

(i) It is a truism to state that air cannot be kept within national boundaries. According to patterns whose main elements are well known today, air floats around the globe. Thus, any interference with the original purity of air has repercussions somewhere else. However, international regulation cannot go so far as to endeavour to establish a legal regime for any human activity affecting the quality of air, since there is almost no such activity which does not, to a greater or lesser degree, have an impact on air conditions. Therefore, restrictive criteria have been observed in practice. First, international regulation has focused on air pollution of a clearly perceivable international character. Second, efforts to curb air pollution have quite naturally concentrated on factors exceeding a certain level of gravity. The most prominent example of a treaty aiming at combatting air pollution is the Convention on Long-Range Transboundary Air Pollution of 1979.[233] However, this instrument with its three additional protocols is confined to the European region. It emerged from preparatory work accomplished within the Economic Commission for Europe. To date, no other region of the globe has followed suit. Nor does there exist a binding international instrument at the world-wide level.

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[229] United Nations, Treaty Series, vol. 480, No. 6964, p. 43.

[230] Reproduced in International Legal Materials, vol. 30, No. 6 (1991), p. 1461.

[231] United Nations, Treaty Series, vol. 610, No. 8843, p. 205.

[232] International Legal Materials, vol. 18 (1979), p. 1436.

(ii) Water has qualities similar to those of air. It is in movement through evaporation and successive rainfall. Thus, water cannot be kept confined forever by one nation, except perhaps for certain stocks of groundwater which, if untapped, may remain unchanged for centuries. On the other hand, water is a largely more stable resource than air, since evaporation as well as the flow of rivers are rather slow processes which can to some extent be controlled by man. It is for these reasons that legal regulation has never targeted water as such, but has instead attempted to establish rules for its different forms of appearance in rivers, lakes, the seas and the oceans. As the debate in the International Law Commission on non-navigational uses of international rivers has shown, States view the water of rivers running through their territories rather as a resource subject to national sovereignty, although recognizing that some international commitments must restrict its use. In any event, the notion of a shared resource -- among the riparians of an international river system -- was not even accepted by the Commission.

(iii) According to scientific research, the ozone layer has a particular importance inasmuch as it prevents life-threatening ultra-violet radiation from reaching the earth's surface. In that regard, the international community has taken action by adopting the Vienna Convention for the Protection of the Ozone Layer,[234] which was subsequently supplemented by the Montreal Protocol on Substances that Deplete the Ozone Layer,[235] which for its part was amended in 1990.[236] Here, again, little remains to be done. In any event, one cannot hope to improve on that regime in a general instrument covering the global commons as a whole.

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[233] ibid., p. 1442.

[234] Of 22 March 1985, reprinted in ibid., vol. 26 (1987), p. 1529.

[235] Of 16 September 1987, reprinted in ibid., p. 1550.

(iv) Lastly, mention should be made of the recent United Nations Framework Convention on Climate Change, adopted in connection with the Rio Summit in May 1992.[237] As indicated by its title, the Convention deals in a specific manner with all of the issues related to the world climate. To be sure, no more than a general framework is set. However, it should be kept in mind that in any event an instrument purporting to regulate the global commons in their entirety would have to be confined to laying down fairly broad principles. By its very nature, it would not have the potential of going into details.

Summing up, one is entitled to state that at the present juncture an extended network of legal rules protecting the global commons already exists. It can hardly be maintained that these rules are fully satisfactory. Nor is it difficult to draw attention to gaps and lacunae here and there which also characterize the overall picture. On the other hand, the potential for innovative strides ahead is obviously rather limited. In the important fields, where major environmental threats can be perceived, the existing instruments go into much more detail than a set of principles or rules on the global commons could ever do.

(c)

An entirely new chapter would be opened if one took the view that the fauna and flora of the globe, whatever their territorial location, were also to be considered as part and parcel of the global commons. Obviously, such a conception would hurt many traditionally held views on national sovereignty. However, at a regional level many treaties exist which seek to protect wildlife as well as plants threatened with extinction. At the Rio Summit in June 1992, the Convention on Biological Diversity[238] was also adopted. Here, again, the outer limits of what is internationally acceptable seem to have been reached for the time being.

3. Main difficulties of a project for the protection of the global commons

The preceding observations have already given some indication of the difficulties a project on the global commons would have to grapple with.

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[236] Amendment reprinted in ibid., vol. 30, No. 2 (1991), p. 537.

[237] Reproduced in ibid., vol. 31, No. 4 (1992), p. 851.

[238] Reprinted in ibid., p. 822.

(a)

All the treaties in force are of a specific nature. They either establish a general regime for one separate element of the global commons (e.g., Antarctica, the high seas, outer space), or they attempt to counteract a specific environmental threat (e.g., air pollution). Thus, it was possible to adapt the regime concerned to the specificities of the subject-matter at stake, drafting rules to be applied directly, not needing to be elaborated upon and concretized through different legislative stages. If the Commission attempted to draft rules for all of the global commons with their widely divergent features, the rules would have to be set at such a high level of abstractness that one could hardly hope to make any progress in comparison to the Stockholm Declaration on the Human Environment of 1972,[239] or the recent Rio Declaration on Environment and Development.[240]

(b)

If the general orientation is to establish a legal regime for the global commons as a whole, this essentially comes down to enjoining States to take precautionary measures so that activities carried out in their territories do not harm resources that condition the existence of mankind. Such a regime, however, cannot be distinguished from a regime for the protection of the territorial integrity of other States. This is particularly obvious in the case of air pollution. Most of the pollution negatively affecting the oceans reaches them from the skies. In order to keep the marine environment intact, therefore, it is necessary to reduce sources of air pollution based on land, that is to say in territories under national jurisdiction. These same sources of pollution, however, also harm neighbouring States. What is needed, therefore, is one regime of air pollution whose parameters are determined by taking into account, at the same time, the harm potentially caused to the global commons as well as the injury which may be inflicted on other States. It would be extremely artificial, if not impossible, to draw up different rules on prevention according to the identity of the potential victim objects. Responsibility is a different matter altogether. In that regard, the classical rules provide no answers, presupposing, as they do, a bilateral relationship between an author State and a victim State.

(c)

A last difficulty stems from the fact that the Commission has the well-known topic "Injurious consequences arising out of acts not prohibited by international law" on its agenda. According to the decisions taken at the last session, the work on this topic is to be carried out by first of all studying the relevant aspects of prevention. As was pointed out above, prevention is a unitary concept, designed to avoid harmful effects from arising, wherever their location. By including in its programme the global commons as a new topic, the Commission would therefore necessarily duplicate the work already begun under "Injurious consequences ..." It would seem infinitely preferable to bear in mind the need of the global commons for protection in establishing a code of duties of prevention. Any other decision would inevitably lead to interminable and sterile debates about the delimitation of the two topics.

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[239] A/CONF.48/14/Rev. 1, pp. 3-5.

[240] Reprinted in ibid., p. 876.

4. Conclusions

(a)

It is not advisable to include a topic "Global commons" in the long-term programme of work of the Commission.

(b)

The concerns underlying the suggestion for the inclusion of such a topic in the Commission's programme of work can, to a large extent, be taken care of in developing appropriate rules of prevention within the framework of the topic "Injurious consequences arising out of acts not prohibited by international law." It would certainly be wise to change the title of that topic in due course in order to make its new orientation plainly visible.

RIGHTS AND DUTIES OF THE STATES FOR THE PROTECTION OF THE HUMAN ENVIRONMENT

OUTLINE BY MR. CHUSEI YAMADA

1. General ideas

The Conclusions of the Siena Forum on International Law of the Environment, which was held in April 1990 at Siena, Italy, properly pointed out that, since the 1972 Stockholm Declaration on the Human Environment,[241] international environmental law has seen many important developments. Its present situation is characterized by an abundance of conventions and other international instruments, which cover many fields and constitute an impressive network of rights and obligations of States. They should be considered a successful achievement of contemporary international law.

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[241] See footnote 239 above.

The existing network of obligations in international conventions leaves, however, certain gaps. Certain fields -- in particular those related to global concerns -- are not yet fully covered. Implementation of conventions, both domestic and international, is not always satisfactory.

The "sector by sector" approach, adopted in the conclusion of conventions, often dictated by the need to respond to specific requirements, involves the risk of losing sight of the need for an integrated approach to the prevention of pollution and the continuing deterioration of the environment.

Customary law in the field of protection of the environment is at an early stage of development. The development of general principles in the form of a convention for filling the gaps of conventions and for insuring the protection of the commons, therefore, would be a challenging but important task for the International Law Commission.

It may be recalled in this connection that the "Survey of International Law,"[242] prepared by the Secretariat for the International Law Commission to select a list of topics to be included in its long-term programme of work, devoted a chapter for the law relating to the environment in order to draw attention of the Commission to the progressive development of international law in this area.

It is proposed that the title of the item would be "Rights and duties of States for the protection of environment" instead of "Human environment." When the title was proposed during the last session of the International Law Commission, I had in mind the Stockholm Declaration on the Human Environment, but to restrict the scope of the item to the human environment would limit too much the effectiveness and usefulness of the outcome in light of the recent conceptual developments in the field of environment.

2. Development of international environmental law

A brief overview of the historical development of international environmental law would give us a useful suggestion on what we should do in this field.

(a)

The characteristics of traditional environmental problems, which have been a subject of international law since the pre-War period, are that they normally arose between two neighbouring nations, in which the identification of the polluter(s) and the victim(s) was relatively easy, and that the dispute between the affected and the affecting State(s) in their bilateral relationships was the kind which could be resolved through the application of the principle of good neighbourliness. A typical example of this type of disputes was the Trail Smelter arbitrarion,[243] which was settled in 1941.

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[242] A/CN.4/245.

The rules of international law of this kind are based on the premise of sovereign equality of territorial States in which the State is expected to exercise due diligence over the economc activities within its territory so that they will not cause any harm to other States; sic utere tuo ut alienum non laedas.

The characteristic of this type of international environmental law is that it is primarily aimed at balanced coordination of exclusive territorial sovereignty of States and, therefore, is not necessarily aimed at the global environmental protection.

(b)

When the environmental degradation, at a later stage, came to cover not only the injury to neighbouring States but also the wide-spread damage to wider areas, a certain tendency for modification of the applicable rules of international law was witnessed.

In the conventions dealing with damages caused by ocean pollution and ultra-hazardous activities such as nuclear or space activities, the principle of responsibility for risk (which is to impose absolute liability of a certain level to those who create risk to the society) has come to be introduced, apart from the traditional principle of responsibility based on negligence.

However, there is no general convention stipulating for the rights and duties of States on ultra-hazardous activities except for those conventions on specific activities, and the contents of the rights and duties therein prescribed are not comprehensive.

(c)

With the drastic expansion of economy and the explosive increase of population in recent years, the global problems, such as destruction of the ozone layer and climate change, have come to be embraced as important topics of international law.

The characteristics of the global environmental problems such as climate change, destruction of the ozone layer, bio-diversity and tropical forests are that they cause gradual but widespread and long-lasting harm to the environment as a combined result of various activities in various countries.

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[243] United Nations, Reports of International Arbitral Awards, vol. III, p. 1905.

These problems, as the common concerns of mankind, give rise to a totally new question of the rights and duties of States, which goes far beyond the traditional relationship of reciprocal obligations of States, and which would take the form of "*erga omnes* obligations" or "general obligations" in its contents, nature and the method of implementation.

From this point of view, the principle of the general obligation of States for the protection of the environment itself created by a number of environmental conventions has an important significance as a basic principle of international law (the principle, for example, is embodied in article 2, paragraph 1, of the 1985 Vienna Convention for the Protection of the Ozone Layer.[244])

3. The form of an instrument to be drafted

As a form of the instrument in the field of environment, it would be appropriate to consider the possibility of drafting an umbrella convention which prescribes general rights and duties of States, going beyond the individuality of specific areas and particular aspects of the environment. Development of rules of international law which are common to all the current and future environmental problems might make it possible to fulfil the gaps left by the existing individual conventions and to keep under some degree of control of international law newly arising environmental problems. It would help avoid leaving any *lacunae* of applicable rules even in the absence of the relevant conventions. It would promote, at the same time, the early identification of the potential environmental problems, and the establishment of more concrete provisions under specific conventions. Needless to say, the purpose of this umbrella convention is not to substitute individual conventions the conclusion of which should be promoted for more effective protection of the environment. The convention under consideration would prescribe common rules which cut across the existing conventions; further details are expected to be complemented by individual conventions on specific subjects.

4. Possible structure of general rights and duties of States for the protection of environment

In view of the historical development of international law and the current situations facing the international community as stated in (2) above, the following might be considered as a possible outline of the general rights and duties of States in this field.

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[244] See footnote 234 above.

- I. General Principles
  - A. Use of terms
    - definition of such terms as "environment," "pollution," "harm," injury," "damage" and "risk" to the environment, etc.
  - B. Legal implication of "general obligations" of States _vis-à-vis_ international community
  - C. The principle of responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment
  - D. Relatively new principles
    - 1. The concept of "sustainable development" -- inter-generational equity
    - 2. Common but differentiated responsibilities for the interests of whole mankind -- consideration of special situations of developing countries
    - 3. Harmonization of environmental policy and trade policy

- II. Substantive and Procedural Rules
  - A. Basic principles
    - 1. Responsibility in neighbourly relations
    - 2. Liability pertaining to activities with high risk
    - 3. Applicability of polluters-pay principle
    - 4. Protection of global environment as a whole
  - B. International cooperation
    - exchange of information, consultations, environmental assessments, etc.
  - C. Principles on distribution of responsibility and liability
    - 1. Responsibility arising from negligence
    - 2. The principle of strict or absolute liability
    - 3. Liability to ensure remedies (e.g., liability of a parent company and/or a State of a parent company concerning activities of subsidiaries harmful to the environment)
  - D. Procedure for the settlement of disputes
    - 1. International procedure for the settlement of disputes
      - (a) Arbitration and/or ruling by competent international organizations
      - (b) The question of jurisdiction of ICJ concerning environmental disputes
      - (c) Admissibility of _actio popularis_ in the field of global environmental disputes
    - 2. Domestic procedure for the settlement of disputes

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      - equal access of non-residents to domestic courts

- III. Measures for the implementation of obligations
  - A. Classification of obligations by their nature and their relationships with the methods of implementation
  - B. Direct implementation measures
    - 1. Implementation by international organizations establishment of rules within the framework of international organizations, opt-out system, pledge and review system, etc.
    - 2. Implementation through domestic laws -- including questions of the principles concerning jurisdiction of States, and the extraterritorial effect of the unilateral domestic measures of a State
    - 3. The question of linkage between framework conventions and the implementing protocols
  - C. Indirect implementation measures
  - D. Disincentive measures
    - 1. Observation of the fulfilment of obligations on the international level
    - 2. Measures taken by international society toward a State having committed certain acts harmful to the environment
      - (a) Imposition of fines and taxes
      - (b) Economic sanctions including trade restrictions and suspension of aid
      - (c) Other measures
  - E. Incentive measures
    - 1. Transfer of funds and technology, tax incentives
    - 2. International mechanism for financial burden sharing
    - 3. Establishment of liability insurance mechanisms

5. Future perspective of the work of the International Law Commission under this item

I am aware that the above list is quite an ambitious one. The Commission will decide in due course on which sub-topics should be considered on a priority basis.

It is necessary to ensure that the convention in question be compatible and harmonized with other topics related to environmental problems (especially the draft articles on State responsibility and international liability, and the draft code of crimes against the peace and security of mankind), the works on which are currently undertaken by the Commission.

Considering that the instrument under this item is proposed to be a comprehensive umbrella convention at this moment, some topics listed in (4) above could be a reduplication of the contents of on-going works of the Commission, which, naturally, we should avoid in the course of our future works.

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ANNEX

Treaties Conflicting with Peremptory Norms of International Law and the Zurich-London "Agreements" *

by Andreas J. Jacovides **

The purpose of the present paper is to consider the question whether international law recognises the existence within its legal order of rules having the character of *jus cogens* i.e. rules from which the law does not permit any derogation by agreement between the parties *inter se* as distinct from *jus dispositivum* i.e. rules which the parties may freely regulate by such agreement[1]. This inquiry will touch upon such material as is available in the writings of scholars, the prouncements of international tribunals and international practice, with particular emphasis on the work of the International Law Commission on the subject and the views expressed thereon by the representatives of States, both in the Sixth (Legal) Committee of the United Nations General Assembly and through written comments of Governments.

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*This is a reprint of an article which appeared in *Treaties Conflicting with Peremptory Norms of International Law and The Zurich-London 'Agreements'*, with ellipses indicating omissions.

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(1)For bibliography see generally Wright, 2., Conflicts between international law and treaties, AJIL, Vol. 2 (1917), pp. 566-579; Lauterpacht, H., The Covenant as the "Higher Law" BYIL, 1936, pp. 54-65; Jenks, C. W., The Conflict of Law-making treaties, BYIL, 1953, pp. 401-453; Verdross, A. Von, Forbidden Treaties in international law, AJIL, Vol. 31 (1937), pp. 571-577; Verdross, A. Von, Jus dispositivum and *Jus cogens* in international law, AJIL, Vol. 60 (1966), pp. 55-63; Schwarzenberger, G, 'International jus cogens', Texas Law Review, March, 1965, pp. 455-478; Suy, E., Le jus cogens en droit international public, Conference de droit international, Lagonissi, (Gréce 3-8 avril 1966); Murty, B. S., Jus cogens in international law, International Law Conference, Lagonissi (Greece 3-8 April, 1966).

Certain considerations and reflections will be put forward regarding the theoretical justification for the existence of the jus cogens doctrine, its effect upon the law of treaties generally and the means for determining whether a given rule does or does not merit the description of jus cogens at a given time ...

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Historical background and recent developments

It may be readily accepted that the general rule of the law of treaties is that States are competent, by agreement between themselves, to conclude treaties on any subject whatsoever and thus regulate their relations with each other at discretion.

From a very early stage of the development of international law, however, this sweeping character of this rule did not remain unchallenged. As early as the middle of the eighteenth century eminent writers such as Christian Wolff[3] and Emeric Vattel[4] were distinguishing between the necessary law, which nations cannot alter by agreement, and the voluntary law created by the will of the parties. Likewise, A. W. Heffter[5] declared, a century later, that treaties were void if their object was physically or morally impossible and by moral impossibility he understood that the object of the treaty was contrary to the ethics of the World.

In more recent times opinion among writers was more divided. Nineteenth century positivism had a significant effect and it was widely accepted that international law did not impose any restrictions upon the freedom of States to conclude any treaty irrespective of its object. Modern writers who, with various degrees of emphasis, have shared this view include such prominent scholars as Charles Rousseau[6], Gaetano Morelli[7], Paul

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(3)Wolff, Jus Gentium, paras 5 and 25. (1764).

(4)Vattel, Le droit des Gens, Introduction paras 9 and 27 (1758).

(5)A. W. Heffter, Das Europaische Volkerrecht der Gegenwatt 156 (4th ed. 1861).

(6)Rousseau, I Principes du Droit International Public 340-341 (1944).

(7)Morelli, Nozioni di Diritto Internazionale 37 (3rd ed. 1951).

Guggenheim[8] and G. Schwarzenberger.[9]

On the other hand, certain recent developments in international law, such as the conclusion of the Kellogg-Briand Pact of 1928 and the decisions of the Nuremberg and Tokyo tribunals and even more important, such fundamental landmarks in the direction of organised international society as the Covenant of the League of Nations and the Charter of the United Nations, have served to reverse this trend. Another such factor is the recent transformation in the composition of the society of nations through the emergence of a considerable number of new States which put their own imprint on the process of developing international law. All these factors have had a decisive effect in reviving and reinforcing the notion that, besides jus dispositivum rules which can be departed from by agreement, there exist certain rules and principles of general international law having the character of jus cogens from which the parties cannot derogate by agreement between themselves.

It has been persuasively argued[10] that the very fact of the existence of norms determining which persons are endowed with the capacity to act in international law, what intrinsic and extrinsic conditions must be fulfilled so that an international treaty may come into existence, what juridical consequences are attached to the conclusion of an international treaty, militates against accepting the view that the whole international law system is dependent on the agreement of the wills of States.

These rules of jus cogens do not exist in order to satisfy the needs of individual States but in order to serve the higher interests of the international community as a whole, and the ultimate justification for their existence is that they rest upon the common expression of the conscience of the international community.

Various terms have been used to describe this notion and to explain the basis upon which it rests. Lauterpacht, referring to the Covenant of the League of Nations, wrote in 1936 that "...the substance of its law differs so radically from other international conventions in its scope and significance as a purposeful instrument in the process of political integration of mankind as to

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(8)Guggenheim, I Traité de Droit International Public 57 (1953) -- but see footnote (19).

(9)Schwarzenberger, International Law 352-3, 425-7 (1957) and op. cit. footnote (1).

(10)Verdross, Forbidden Treaties in International Law, op. cit. footnote (1).

deserve the designation of a 'higher law' ..."[11]. McNair writing in 1930 and referring both to the Covenant and to the Kellogg-Briand Pact, says[12] that these instruments created "a kind of public law transcending in kind and not merely in degree the ordinary agreements between States". These views, expressed in the inter-war years, would have equal, if not greater, validity in relation to the United Nations Charter. The terms "international public policy" and "international public order" (ordre public) have also been used to underscore the notion that these rules of jus cogens or peremptory norms are firmly based upon the conscience of mankind, that they represent some higher social needs and that they are the minimum of rules of conduct necessary to make orderly international relations possible.

Writers who have shared and promoted a position in favour of the existence of jus cogens include, in addition to Lauterpacht[13] and McNair,[14] such eminent jurists as Balladore Pallieri,[15] Kelsen[16] and Tunkin[17]. The eminent Austrian international jurist Verdross[18] deserves a particular place among these writers. It now appears to be the general trend, even among those who previously held different views, with the notable exception of Schwarzenberger, to accept the notion of jus cogens.[19]

The issue of jus cogens received scant attention before international tribunals. The instances quoted where the matter was touched upon are not directly on point. These are the celebrated individual opinion of Judge Anzilotti in the Austro-German Customs

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(11)Lauterpacht op. cit. footnote (1).

(12)McNair "The functions and differing legal character of treaties, BYIL 11 (1930), 112.

(13)See also Oppenheim-Lauterpacht, 8th Edition (1955), p. 896 to the effect that "immoral obligations cannot be the object of an international treaty".

(14)See also McNair, Law of Treaties 213-4 (1961).

(15)Balladore Pallieri, Diritto Internazionale Publico 282 (8th ed. 1962).

(16)Kelsen, Principles of International Law, 89, 323, 344 (1952).

(17)Tunkin, Das Volkerrecht der Gegenwart, 95-96 (1963).

(18)Verdross, Von, op. cit. footnote (1).

(19)Suy, op. cit. footnote (1) at p. 55.

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Union case[20] (where he questioned whether there is not a contradiction in the fact of obliging a State to live and of putting it at the same time into a situation which renders its life extremely difficult -- and see post, on the principle of sovereign equality) and of the dissenting opinion of Judge Schucking in the *Oscar Chinn* case,[21] where he stressed that the Court would never apply a convention the contents of which were contrary to *bonos mores*. In its Advisory Opinion concerning *Reservations to the Genocide Convention*[22] the Court, referring to the Genocide Convention, "adopted for a purely humanitarian and civilising purpose", commented that "the contracting States do not have any interest of their own: they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the Convention[23]".

The work of the International Law Commission and issues arising therefrom

The process of the acceptance of the *jus cogens* doctrine as part of contemporary international law was further promoted through the work of successive Special Rapporteurs of the International Law Commission on the law of treaties and culminated during the fifteenth session of the Commission in 1963. It will be recalled that the Commission, after extensive discussion of the subject[24] and after fully considering the various aspects of the text submitted by its latest Special Rapporteur, Sir Humphrey Waldock,[25] reached the unanimous conclusion that--

> " A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international

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(20) P.C.I.J., Series A/B No. 41.

(21) P.C.I.J., Series A/B, No. 63, p. 149.

(22) I.C.J. Reports, 1951, 23.

(23) For an extensive collection of material from the international jurisprudence, including references to individual and dissenting opinion, on the subject see Suy, op. cit. footnote No. (1), pp. 76-84.

(24) Yearbook of the International Law Commission, 1963, Vol. I, pp. 62-78.

(25) A/CN.4/156.

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law having the same character". (Draft Article 37)[26].

The Commission also took the further step, which was only the logical corollary of its adoption of the draft Article cited above, of adopting a further draft Article, 45,[27] covering the case of the emergence of a new peremptory norm of general international law, through either custom or a general multilateral treaty, and its effect upon treaties:

> " 1. A treaty becomes void and terminates when a new peremptory norm of general international law of of the kind referred to in Article 37 is established and the treaty conflicts with that norm.
>
> " 2. Under the conditions specified in Article 46,[28] if only certain clauses of the treaty are in conflict with the new norm those clauses alone shall become void,"[29]

The close study of the records of the Commission's debate of this matter,[30] the commentary accompanying the text,[31] the records of the debate in the Sixth (Legal) Committee of the General Assembly on the Commission's Report,[32] the comments of Governments[33] regarding draft Article 37, as well as the Special Rapporteur's comments as set out in his Fifth Report,[34] furnishes a wealth of evidence to demonstrate that the principle as stated in

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(26)Official Records of the General Assembly, Eighteenth Session, Supplement No. 9 (A/5509), p. 11.

(27)Op.cit. footnote (26) at page 23.

(28)Op. cit. footnote (23) at p. 26.

(29)As is pointed out by the Special Rapporteur in the course of the debate in the ILC, the nineteenth century conventions for regulating the slave-trade were valid when drawn up but subsequently became void by the development of a new rule of international law prohibiting the slave-trade altogether.

(30)Op. cit. footnote (24).

(31)Op. cit. footnote (26).

(32)Official Records of the General Assembly, Eighteenth Session, Report of the ILC (item 69).

(33)A/CN.4/175 et Addenda.

(34)A/CN.4/183 Add. 1.

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the draft Article meets with general approval, if not with complete unanimity.[35]

The examination of these records also reveals the significant role which the new States which came into existence subsequently to the Second World War, as well as the East European States,[36] played in helping establish the existence of this rule, although the contribution of the Latin American as well as of several Western European States is in no way underestimated. On the whole, it may be said that it is particularly the smaller and weaker States which have a greater interest in the recognition of the existence and the strengthening of a public order placing checks upon an unlimited freedom of contract, as opposed to a situation which, under the respectable guise of the unlimited freedom of contract, exposes them to the real danger of unequal and inequitable treaties under which the stronger State would, in the nature of things, take the lion's share.[37]

The rule which finds expression in draft Article 37 corresponds to the rule in muncipal systems of law[38] to the effect that an agreement to commit a crime or one which is otherwise contrary to public policy is null and void and cannot be construed as conferring any rights upon the parties to it (*ex injuria non oritur jus*). The recognition on the part of the Commission of the existence of the equivalent rule in public international law constitutes a most constructive contribution by the Commission in pursuance of its mandate not only to codify but also to further the progressive development of international law.

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(35)While comments on the part of Governments were favourable, with several shades of enthusiasm, only the Government of Luxembourg was openly negative to the notion, while the Government of Turkey took also a negative but more guarded approach.

(36)Both of these categories of States are characterised by their own approach to international law. For a Western view of these approaches see e.g. Higgins, Conflicts of Interest-London, 1965, and Lissytzin, International Law Today and To-morrow, New York, 1965.

(37)In the course of the discussion in the ILC on draft Article 37 the distinguished Spanish jurist Dr. de Luna observed: "The contractual conception of international law, which did not recognise *jus cogens*, belonged to the time when international law had been only a law for the Great Powers. But modern international law has become universalised and socialised".

(38)A rule which may undeniably be described as a general principle of law recognised by civilised nations within the meaning of Article 38 of the Statute of the International Court of Justice.

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As was epigrammatically put by Dr. El Erian, in the course of the subsequent debate in the 6th Committee of the General Assembly, "the recognition of the notion ... marked a transition from classical international law to the modern law of the United Nations".

The Commission has been criticised for its formulation of draft Articles 37 and 45 on two grounds. Firstly, that they involve the creation of a new ground on which treaty obligations can be denied; and secondly, that they would furnish to third States the right to discuss the legal validity of agreements to which they are not parties and which normally would not be their concern. It is argued that particularly the former ground creates the great danger that, since the rules of jus cogens cannot be precisely identified and stated, the recognition of their existence enables every State wishing to denounce a treaty, to put forward a plea of nullity alleging the repugnance of such a treaty with jus cogens.

While this danger cannot be denied and the principle of jus cogens can indeed be abused, it is believed by the present writer that it can, and should, be minimised if not completely eliminated through as exact a delimitation of the rules of international law falling within the category of jus cogens as possible (see post) rather than by ignoring the existence of such rules altogether. In this respect the analogy with the equivalent municipal law rule is instructive: No one denies the existence in municipal law of rules of public policy even though these, too, are not always clearly and exactly defined or definable. It may of course be retorted that in the case of municipal law systems, whenever there arises a doubt as to whether in a given case such a rule does or does not apply, the matter can always be referred to and be settled by a competent tribunal.

There may indeed be a lot to be said in favour of making the determination as to whether a given situation is or is not covered by a rule of jus cogens, especially when the plea of nullity is contested by one of the parties, subject to the decision of an impartial tribunal. In his Report to the International Law Commission, Lauterpacht phrased the relevant Article as follows:

> " A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice."[39]

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(39)Yearbook of the International Law Commission, 1953, Vol. II, p. 154.

Likewise, Verdross[40] had suggested that all disputes concerning the interpretation and application of a norm having the character of jus cogens must be submitted to arbitration.

It is axiomatic that if the rule of law among nations is to acquire its full meaning, the jurisdiction of an International Court (whether in its present or other form) ought to be universal and the means should be provided whereby its decisions would be enforced. International institutions, however, cannot be raised from the co-operative to the organic level until we have a society of States which is far more closely bound together than are the States of today. In the present imperfect stage of development of the international society, with the Court's jurisdiction dependent on the consent of the individual States and suffering from a variety of other inhibiting factors, it would, it is believed, be plainly unrealistic to tie the principle jus cogens to adjudication by the International Court and the International Law Commission acted in accordance with the hard facts of the international life of today.

The absence of compulsory adjudication, however, does not mean that international law in general, or its jus cogens in particular, lacks binding legal force. Moreover, there exist a number of other means for the peaceful settlement of disputes between States including, in addition to negotiation, conciliation, mediation and arbitration, recourse to the Security Council and the General Assembly of the United Nations. In particular, Article 14 of the Charter, which empowers the General Assembly to make recommendations for the peaceful adjustment of any situation regardless of origin, is certainly sufficiently broad to enable the General Assembly to pronounce itself upon disputes between Member States involving the inconsistency of treaty provisions with rules of jus cogens,[41] especially if such disputes are basically political in nature.

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(40) Op. cit. footnote (1).

(41) Indeed General Assembly resolution 2077 XX, on the Question of Cyprus, furnishes a good illustration of the point. And see the statement of Mr. Paredes who, in the course of the debate in the International Law Commission on the more specific rule of a treaty imposed upon a State by the threat or use of force in violation of the principles of the Charter and consequently in violation of the relevant jus cogens rule, stated that, in the absence of compulsory international adjudication, "the only remedy would be ... that the victim of aggression should be able to appear before the United Nations Security Council and declare the treaty void because of vitiation" -- Yearbook of the International Law Commission, 1963, Vol. I, p. 61.

As for the second ground of criticism, viz. the possibility for third States to concern themselves with situations to which they were not parties, it may be said that this may have been well-founded in the past. However, it must be accepted that in an interdependent world intended to be regulated in a number of respects by such a fundamental instrument as the Charter of the United Nations, it would be anachronistic to claim that third States should have no voice when patent illegalities are perpetrated against one or more of the members of the society of nations.

Turning now to the question of what effect the conflict of a jus cogens rule has upon a treaty, the members of the Commission were unanimous in their view that the treaty becomes null and void ab initio, rather than simply voidable at the instance of one or more of the parties. The legal consequences of this view are far-reaching for "the consequence of voidance ab initio was simply that there was no treaty".[42] Likewise, Verdross[43] takes the view that the formal voidance of immoral contracts is unnecessary and that the burdened State has the right simply to refuse the fulfilment of such an obligation. It would therefore, appear that, at least according to these views, and in the absence of any provision in the Article for third party determination, such treaties as conflict with jus cogens can simply be taken as non-existent i.e. as not requiring any further act declaring such treaty to be not binding.[44]

The Commission, after considering the possibility of severance of the offending provisions from the rest of the treaty, under the conditions laid down in Article 46 of the Draft, took the view of the majority of its members who considered that rules of jus cogens are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of jus cogens, the treaty must be considered totally invalid and the sanction of nullity should extend to the whole transaction.

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(42)Rosenne op. cit. footnote (41) at p. 55.

(43)Op. cit. footnote (1).

(44)This might indeed in some cases be too drastic a remedy and it might, when the illegality is disputed, strengthen the argument that the doctrine is subject to abuse. One might wonder whether, on the analogy of null marriages, it would not be appropriate for a formal act to take place in order to "take if off the book." In that case, however, it would seem that it would be for the party contesting the plea of nullity and relying on the treaty in question to prove its legality.

By contrast, in the case of a new peremptory norm emerging (Article 45, supra) the effect of the rule is not to render the treaty provision in question void ab initio but to invalidate it only from the date when the new rule of jus cogens was established i.e. to forbid further performance. Likewise, the Commission took the view that, under the conditions provided in Draft Article 46, severance is permitted in the case of Draft Article 45, with the result that provisions not affected by the emergence of the jus cogens rule in question would be regarded as still valid.

The relationship between Article 103 of the Charter and Article 37 of the International Law Commission's draft.

The interesting question which arises in this connection is the relationship between the effect of Article 103[45] of the Charter of the United Nations and Article 37 (and 45) of the International Law Commission's draft. Reference to the preparatory work regarding Article 103 shows that the Article does not provide for the automatic abrogation of treaties conflicting with the Charter, but rather requires that obligations under the Charter shall prevail.[46]

In the course of the discussion of the International Law Commission's draft by the Sixth Committee of the General Assembly many representatives pointed out that Article 103, by proclaiming that obligations under the Charter prevailed over obligations under any other international agreement, had aided greatly in creating the jus cogens rule. Yet, as various representatives stated, its logical consequences had not been recognised, and it was that gap which the International Law Commission had filled by stating that an international treaty was void if it conflicted with a peremptory

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(45) Which provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

(46) The Committee on Legal Problems, Committee 2, decided that "it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof. It has been deemed preferable to have the rule depend upon and be linked with the case of a conflict between the two categories of obligations. In such a case the obligations of the Charter would be pre-eminent and would exclude any other" -- Report of the Rapporteur of Committee IV/2, U.N. Doc. 933, IV/2/42, U.N. Conf. Int.'l Org. docs 707 (1945).

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norm of international law.[47] The matter occupied again the attention of the Commission when, in its commentary on draft Article 63, it recognised the primacy of the rule in Article 103, in the context of the relative priority of incompatible treaty obligations. As the Special Rapporteur pointed out, however, while the Commission appreciated that there may be certain areas of overlap in the application of the jus cogens provisions of Articles 37 and 45 and of Article 103 of the Charter because certain provisions of the Charter, notably those of Article 2(4), are of a jus cogens character, it nevertheless considered the invalidity of a treaty under Articles 37 and 45 of the draft Articles, by reason of a conflict with a rule of the jus cogens, to be a distinct and independent question.[48] In other words, while Article 103 refers to priority or conflicting obligations, draft Articles 37 and 45 refer to invalidity of obligations -- yet they may, and do, overlap in certain areas. While the writer shares the view of Sir Humphrey Waldock that not all rules contained in the Charter are necessarily peremptory norms and, conversely, there are peremptory norms that are not contained in the Charter, it is believed that the area of overlap is considerably greater than merely the principle contained in Article 2(4) of the Charter (see post).

The question of what rules of international law fall within the category of peremptory norms.

While it appears that the principle of the existence of peremptory norms from which no derogation by treaty is permitted, has won overwhelming approval both within and outside the International Law Commission, the question of what specific rules of international law fit under this description, in other words, what is the exact juridical content of this principle, is considerably less clear.

The International Law Commission was unable to arrive at any generally recognised criterion by which to identify a general rule of international law as having the character of jus cogens. Certain examples were suggested by some of the members of the Commission "of the most obvious and best settled rules of jus cogens" in order to indicate the general nature and scope of the rule, and indeed some of these had originally appeared in the body of the draft Article as presented by the Special Rapporteur. These included, in addition to the case of the threat or use of force contrary to the principles of the Charter (a subject to which we shall return, see post), a treaty contemplating the performance of any act criminal under international law; a treaty contemplating or

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(47)Official Records of the General Assembly, Eighteenth Session -- Agenda item 69, document A/5601, para. 18.

(48)A/CN.4/183/Add. 1 pp. 23-24.

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conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to cooperate; treaties violating human rights; treaties violating the right to self-determination.[49] Some members of the Commission[50] stressed that the examples given should include unequal treaties.

In the end, however, the Commission, bearing in mind the comparatively recent emergence of these rules and the rapid development of international law, decided against including any specific examples and of leaving "the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals". The Commission reached this conclusion (a) because it thought that to include certain examples and not others might lead to a misunderstanding regarding the position of other cases not expressly mentioned; and (b) because it feared that, if it were to draw up, even on a selective basis, a list of the rules meriting the description of jus cogens, it might find itself engaged in a prolonged study of matters which did not fall within the ambit of the law of treaties. It may well be that the Commission, in the particular circumstances of its work, acted wisely in adopting this cautious approach. While the first reason given is not a very convincing one (it would always be possible to furnish an illustrative list of examples, thereby giving concrete expression to the principle generally stated in the draft Article, and to stress that this is not an exhaustive list) the second reason, which in any case is connected with the first, presents a much more real problem. As was pointed out in the course of the Commission's debate,[51] the problem, reduced to its simplest terms, was how to define illegality in international law and this, in view of the widely divergent political theories and conflicting interests involved, is indeed a formidable task[52] if the unanimity which prevailed in the adoption of the principle was to be preserved. The danger of opening a Pandora's box of disagreements and the consequent weakening of the very principle which was so painstakingly reached by unanimity is only too clearly visible to be ignored.

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(49)Op. cit. footnote (26) at pp. 11-12.

(50)Mr. Lachs and Mr. Tunkin, op. cit. footnote (24).

(51)By Mr. Amado, op. cit. footnote (24).

(52)As the efforts to define aggression and, more recently, the current efforts in the Sixth Committee and its Special Committee to arrive at an agreed formulation of the principles of international law governing friendly relations and co-operation in accordance with the Charter of the United Nations, illustrate.

At the same time the impression should not be permitted to be created that the notion of jus cogens is merely a philosophical or theoretical idea devoid of any real meaning. Nor can the suggestion be entertained that the principle so clearly formulated by the Commission means all things to all people but has no practical significance in present day international law. The almost unanimous reception of the principle by the representatives of Governments(53) militates against any such cynical evaluation of the Commission's work on this subject -- an evaluation which offends the legitimate expectations of the vast majority of the members of the international community and outrages the social conscience of mankind upon which, in the last analysis, the notion of jus cogens ultimately rests.

It is therefore to be regretted that the difficulties which confronted the Commission prevented it from going the full way and from spelling out the content of the principle it enunciated, thereby completing the process which it had so admirably initiated and advanced. The door is left open to the danger on the one hand of too broad a definition of what constitutes jus cogens with the consequent risk of abuse and stretching the principle to the point of breaking and, on the other hand, to too narrow or restrictive a definition thereby robbing the principle of any real meaning and negativing its effect.

The question arises whether there exists no other body within the machinery of the organised international society of today, which might usefully undertake the task at the point where the International Law Commission left it. One such possible forum which comes readily to mind is the Sixth (Legal) Committee of the General Assembly. If one bears in mind that jus cogens is formed through the expression of the collective conscience of the community of nations there might be a lot to recommend to the Sixth Committee -- where, unlike the International Law Commission, all Member States are represented -- acting possibly through a special committee, whereon States would be represented by jurists, to undertake the task of defining what rules of general international law constitute peremptory norms for the purpose of the jus cogens doctrine. Undoubtedly the Committee would be faced by the same real difficulties as the Commission was. Likewise any resolution, or declaration, that it might be able to arrive at by the requisite majority might be open to the objection that it did not itself constitute a source of law and was not binding. Nonetheless any such resolution, especially a unanimous or near-unanimous one though not in itself a source of law, might be taken as confirming the existing law on the subject and would in any case carry considerable weight as the expression of the general opinion of

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(53) Op. cit. footnotes (32) and (33).

States.[54]

Another possibility might be offered by the proposed Conference of Plenipotentiaries to be convened in 1968 in order to adopt a multilateral convention on the Law of Treaties.

Quite independently, however, of these possibilities there is no doubt that in the light of the principle unanimously adopted by the Commission and overwhelmingly approved by States and by international jurists, there exists considerable material upon which to base the conclusion that there exist today a considerable number of rules of general international law which have a legitimate claim to be regarded as peremptory norms (jus cogens). Indeed several were mentioned in the Commission's discussion and are referred to above.[55] The present writer shares the view of Mr. Rosenne who stated in the course of the International Law Commission's discussion[56] that 'there existed elements which made it possible to determine with a reasonable degree of accuracy whether a given rule constituted jus cogens' ...

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(54) E.g. see the statements of Mr. Yasseen and Mr. Baztos, also shared by Mr. Waldock, on the effect of General Assembly resolution as expressing rules of jus cogens Op. cit. footnote (24).

(55) It is sometimes stated e.g. Verdross Op cit. footnote (1), that treaties encroaching upon the rights of third states are contrary to jus cogens. If appears the better view, now recognised also by Verdross, that this falls properly under the pacta tertiis nec nocent nec prosunt rule. While these treaties are illegal if the third State does not give its consent, in the ordinary case it would not be contrary to jus cogens.

(56) Op cit. footnote (24).